



San Francisco Law Library

436 CITY HALL

No. 144075

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

2584
No. 12261

United States
Court of Appeals
For the Ninth Circuit.

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation, *2583* Appellant,
see vol. vs.
SCHENLEY DISTILLERS CORPORATION,
Appellee,
and
SCHENLEY DISTILLERS CORPORATION,
Appellant,
vs.
COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation, Appellee.

Transcript of Record
In Two Volumes
Volume II
Pages 523 to 1016

Appeals from the United States District Court for the
Southern District of California,
Central Division.

OCT 25 1949



No. 12261

**United States
Court of Appeals
For the Ninth Circuit.**

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION,

Appellee,

and

SCHENLEY DISTILLERS CORPORATION,

Appellant,

vs.

COMPANIA ENGRAW COMMERCIAL E. INDUSTRIAL
S. A., a Corporation,

Appellee.

Transcript of Record

In Two Volumes

Volume II

Pages 523 to 1016

**Appeals from the United States District Court for the
Southern District of California,
Central Division.**

PLAINTIFF'S EXHIBIT 60-D

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A., a Corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Deposition of Mario Polastri, taken before me,
Jones R. Trowbridge, Consul of the United States
of America at Buenos Aires, Argentina, at 10 a.m.
on November 24, 1947, under authority and by
virtue of a commission issued out of the District
Court of the Southern District of California, Cen-
tral Division, in the above entitled cause.

It appearing that the witness, Mario Polastri,
could not intelligently testify in the English lan-
guage, one Clara Robine, of Avda. R. Saenz Pena
530, Buenos Aires, Sworn Public Translator, who
also well understands the Spanish and English lan-
guage, was employed as interpreter and was sworn
in as follows:

“You do solemnly swear that you know the [501]
English and the Spanish languages and that you

Plaintiff's Exhibit 60-D—(Continued)

will truly and impartially interpret the oath to be administered and interrogatories and cross-interrogatories to be asked Mario Polastri, a witness, now to be examined, out of the English into the Spanish language, and that you will truly and impartially interpret the answers of the said Mario Polastri the reto out of the Spanish language into the English language, So help you God."

and said Clara Robine interpreted accordingly.

The answers of the witness, Mario Polastri, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

"You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Mario Polastri, a witness, now to be examined. So help you God."

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Mario Polastri of Corrientes 456, Buenos Aires, Argentina, broker, 46 years of age, being by me first duly [502] sworn as follows:

"You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God."

Plaintiff's Exhibit 60-D—(Continued)

deposes and says:

Answers by Mario Polastri to
Interrogatories

To the First Interrogatory, he says:

My name is Mario Polastri; 46 years of age; residence; Corrientes 456 Buenos Aires, Argentina. Occupation: Broker.

To the Second Interrogatory, he says:

Since 1944. I am not a member of any commercial society. Always worked here like a broker without partners.

To the Third Interrogatory, he says:

I know the Plaintiff Engraw, but I do not know the defendant Schenley. I know Engraw for about two years.

To the Fourth Interrogatory, he says:

I am a member of the Bolsa de Comercio, since 1940. My associate number is 3351. The Bolsa de Comercio is a private institution between traders to collaborate and carry on business.

To the Fifth Interrogatory, he says:

Glucose in Argentina is made from corn only. I do not [503] exactly know the production. It is approximately around 35,000 tons per year.

To the Sixth Interrogatory, he says:

It varies from year to year and I do not know exactly the amount of glucose consumed in this

Plaintiff's Exhibit 60-D—(Continued)

country. My own estimation is that it is around its third of the entire production. When it is possible the export amounts to about two-third of the total production. The carry over in my opinion is about 15 to 20,000 metric tons. The balance on hand during the years 1946 and 1947 is the same as the carry over stated above. I have no further details to furnish.

To the Seventh Interrogatory, he says:

There was a very reduced market.

To the Eighth Interrogatory, he says:

I do not know the precise total. The prices between May and July 1946 were 1.20 to 1.23 pesos Argentine currency per kilo free alongside (F.A.S.). Later the market fell with no possibility of doing any business. In my opinion the prices during the period July 1946 and May 1947 went down to such an extent that in order to make a sale it was necessary to have a vendue, in which only a price of about 0.20 cents Argentine currency per kilo could be obtained. I speak like a broker who is in the situation to sell the balance. The purchasers who had selling contracts [504] with their clients could still sell for domestic consumption at 0.60 cents Argentine currency per kilo. I consider it impossible for one factory to sell to the local clients of the other factory, and more difficult for exporters to sell on the local market, as he only can export.

Plaintiff's Exhibit 60-D—(Continued)

To the Ninth Interrogatory, he says:

The prices were in May, June and July 1946, 1.20 to 1.23 Argentine currency per kilo; as to the prices for the other months, I confirm what I answered to interrogatory No. 8, where I have given the price and the market situation.

To the Tenth Interrogatory, he says:

I do not know exactly.

To the Eleventh Interrogatory, he says:

As a broker for export of general products, I cannot state the difference exactly, and I do not sell for local consumption.

To the Twelfth Interrogatory, he says:

Yes.

To the Thirteenth Interrogatory, he says:

This question is answered in the general lines of answer to interrogatory No. 8. It is well to point out at the same time that said 460 tons were weighing on this market, other quantities unsold were added to such amount because of the great decrease of international prices and the phenomenon became more important. Using my personal relationship abroad, I have cabled to Swedish, Swiss and [505] Italian firms, offering glucose without any surcharge on the prices paid by Engraw. The answers were negative, they were sorry the product did not interest them. The Italian firm added besides that UNRRA had flooded Europe with glucose and they could not consume the one in stock.

Plaintiff's Exhibit 60-D—(Continued)

These offers had been made in September and October 1946.

To the Fourteenth Interrogatory, he says:

Covered by my answer to interrogatory No. 13.

To the Fifteenth Interrogatory, he says:

The local consumer usually receives glucose in bulk. The cost of wooden containers would therefore be wasted.

To the Sixteenth Interrogatory, he says:

All Argentine glucose meets the requirements of U.S.P. (United States Pharmacopea); for such reason the chemical analysis is not necessary; nevertheless chemical analysis is done on about 80% of the amounts exported.

To the Seventeenth Interrogatory, he says:

No other glucose is produced.

To the Eighteenth Interrogatory, he says:

No.

To the Nineteenth Interrogatory, he says:

I have had no experience in such cases, because I am a broker. [506]

Answers by Mario Polastri to
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

(a) No.

(b) I have been employed during fifteen years

Plaintiff's Exhibit 60-D—(Continued)

by Italcable, beginning as a canvasser and leaving the firm as head of the commercial department, when it suspended services on account of the war. Immediately afterwards I opened my office as an independent broker, taking advantage of my previous experience in Europe.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) In my capacity as a broker I have made transactions with all the firms mentioned. I have never been an employee or agent of any of them.

(b) I know Mr. Fred Berger in Engraw. (I met him on the occasion of these transactions, which are the object of the present suit). In Sociedad Industrial Financiera Argentina (SIFAR) I have known Mr. Luis Ditisheim for the past three years. In Eugenio Lang I know all the executives and the staff since they arrived in the country. I have known Mr. Ricardo Gonzalez for about 20 years. My relationship with all of them was only commercial.

(c) Covered by my answer to point (b). [507]

(d) Covered by my answer to point (b).

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4), he says:

(a) It is a private institution, whose members, under certain rules, sponsored by said institution, perform transactions in purchase and sale of products.

Plaintiff's Exhibit 60-D—(Continued)

(b) There is only one Bolsa de Comercio in Buenos Aires, handling all kinds of products, and there exist some other Bolsas, each specialized in different products, but there is no specialized Bolsa for glucose.

(c) Privately owned.

(d) Not competitive.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) There is no glucose manufactured from sugar cane or beets in Argentina.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) No production from sugar cane. In my opinion the amount of glucose of maize consumed, is about 15,000 tons per annum. The amount exported is about 10 to 15,000 tons during the same period. The carry over from 1945 is perhaps 5,000 tons. The balance on hand is about 10,000 tons.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) I am not in a position to answer exactly because such statistics are not published in Argentina.

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) No. I am working only as a broker.

(b) Idem.

(c) Idem.

Plaintiff's Exhibit 60-D—(Continued)

(d) *Idem.*

Answers by Mario Polastri to Second
Interrogatories Numbers One to Seven

To the First Interrogatory, he says:

Name: Mario Polastri, 46 years of age, Residence: Corrientes 456, Occupation: Broker.

To the Second Interrogatory, he says:

Since 1944. I am not a member of a commercial society. Always worked here like a broker without partners. The aggregate amount of my operations per annum is about ten million pesos Argentine currency.

To the Third Interrogatory, he says:

I know the Plaintiff Engraw, but I do not know the defendant Schenley. I know Engraw for about two years.

To the Fourth Interrogatory, he says: [509]

As a member of the Bolsa de Comercio I can perform my operations as a broker, and the government does not require any special license, but only the payment of taxes.

To the Fifth Interrogatory, he says:

Such data do not pertain to my operations.

To the Sixth Interrogatory, he says:

Covered by my answer to interrogatory No. 5.

To the Seventh Interrogatory, he says:

Covered by my answer to interrogatory No. 5.

Plaintiff's Exhibit 60-D—(Continued)

Answers by Mario Polastri to Second
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

(a) I have been during fifteen years employed by Italcable, beginning as a canvasser and leaving the firm as head of the commercial department, when it suspended the services on account of the war. Immediately afterwards I opened my office as an independent broker, taking advantage of my previous experience in Europe.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) In my capacity as a broker I have made transactions with all the firms mentioned. I have never been employee or agent of any of them.

(b) I know Mr. Fred Berger in Engraw. (I met him on the [510] occasion of these transactions which are the object of the present suit). In Sociedad Industrial Financiera Argentina (SIFAR) I have known Mr. Luis Ditisheim for the past three years. In Eugenio Lang I know all the executives and the staff since they arrived in the country. I have known Mr. Richardo Gonzalez for about twenty years. My relationship with all of them was only commercial.

(c) Covered with my answer to (b).

(d) Covered with my answer to (b).

Plaintiff's Exhibit 60-D—(Continued)

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) Such data do not pertain to my operations.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) Such data do not pertain to my operations.

(b) Covered with my answer to (a).

(c) Covered with my answer to (a). [511]

PLAINTIFF'S EXHIBIT 60-E

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S. A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Deposition of Juan K. Lang, taken before me,
Jones R. Trowbridge, Consul of the United States
of America at Buenos Aires, Argentina, at 4:00
p.m. on November 20, 1947, under authority and by

(Plaintiff's Exhibit 60-E—(Continued)

virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Juan K. Lang, did well understand the English language, I, Jones R. Trowbridge, Consul of the United States, who also well understand the said language, administered the oath and the interrogatories and cross-interrogatories were put to him in the English language. The answers of the witness, Juan K. Lang, to said interrogatories and cross-interrogatories were taken down stenographically by Carlota S. de Lange, of Vidal 1940, [512] Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Juan K. Lang, a witness now to be examined. So help you God.”

Juan K. Lang of 615 Avda. R. Saenz Pena, manager and partner of Eugenio Lang S.R.L., of Avda. R. Saenz Pena 615, Buenos Aires, Argentina, 37 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says:

(Plaintiff's Exhibit 60-E—(Continued))

Answers by Juan K. Lang to
Interrogatories

To the First Interrogatory, he says:

Juan K. Lang, 37 years of age, residence Buenos Aires, 615 Avda. R. Saenz Pena, occupation exporter.

To the Second Interrogatory, he says:

I am manager and partner of Eugenio Lang S.R.L. for 10 years. Our firm exports Argentine commodities and foodstuffs to the extent of 10 to 25,000 pesos annually.

To the Third Interrogatory, he says:

I know Plaintiff since May 1946 and the defendant by [513] name.

To the Fourth Interrogatory, he says:

I am since several years member of the Bolsa de Comercio which at the same time is a commodity exchange and a stock exchange. My firm operates to the extent of 3 to 5,000.000 pesos annually on this exchange.

To the Fifth Interrogatory, he says:

Glucose is manufactured in Argentina from corn (maize). I estimate the annual production between 28,000 and 31,000 tons.

To the Sixth Interrogatory, he says:

I don't know the amount of glucose consumption in Argentina nor do I know the carry-over and the balance on hand during the years of 1946 and

(Plaintiff's Exhibit 60-E—(Continued))

1947 as no official statistics are published to this effect. My best estimate would be that local consumption is about 18 to 19.000 tons, that the carry-over at the end of 1946 was about 3 to 5.000 tons. The export during 1946 was 8.014 metric tons.

To the Seventh Interrogatory, he says:

There was a market for glucose crystal clear testing between 43° and 45° Baume made from pure corn in Buenos Aires up to May 1, 1947. However since the beginning of the second half of 1946, this market was swamped with offers whilst no buyers appeared.

To the Eighth Interrogatory, he says: [514]

Glucose was bought and sold during the first half of 1946 at prices ranging from 1.15 to 1.22 pesos per kg packed for export; at the beginning of the second half of 1946 the market collapsed and virtually no transactions were made for a rather long period. Only some minor transactions were made during the last months of 1946 and the first three months of 1947 at prices ranging between 55 and 60 centavos per kg. The market however continued to go down and between April 1947 and November 1947 glucose has been sold between 43 and 55 centavos per kg.

To the Ninth Interrogatory, he says:

May and June 1946: pesos 1.15 to 1.22 per kg; July, August, September practically no operations; October, November, December: 60 to 62 centavos;

(Plaintiff's Exhibit 60-E—(Continued))

January, February, March 1947: 55 to 60 centavos; April 1947: 50 to 53 centavos. The reason for the sudden collapse of the market was the non-shipment of glucose to the export markets and as a consequence the accumulation of stocks in Buenos Aires.

To the Tenth Interrogatory, he says:

There is no difference except expenses for export expenses for export packing and expenses connected with export.

To the Eleventh Interrogatory, he says:

There is a difference of about 15 centavos per kg. These 15 centavos are composed as follows: 10 centavos cost of container, 2 centavos export tax and cost of export license, [515] 2 centavos stevedoring and expenses of custom broker, 1% banking expenses.

To the Twelfth Interrogatory, he says:

Yes. All glucose was made from pure corn.

To the Thirteenth Interrogatory, he says:

It would have had a disastrous effect. No glucose has ever been sold in public auction in Buenos Aires and the sale of such a heavy quantity cannot be made in public auction; the local consumers are used to purchase very small quantities (3 to 5 tons weekly or biweekly), they cannot and would not buy or store any larger quantity and would not even attend a public auction for such heavy quantities.

To the Fourteenth Interrogatory, he says:

(Plaintiff's Exhibit 60-E—(Continued))

It is simply inconceivable that quantities as mentioned can be sold in public auction in Buenos Aires. In my opinion in a public auction of such quantities the prices would have dropped to 20 or 25 cenatvos if buyers would have appeared at all.

To the Fifteenth Interrogatory, he says:

Yes. It would have had an adverse influence. Local consumers are generally used to bulk glucose and merchandise packed in wooden barrels means additional labour expenses and the necessary storage space.

To the Sixteenth Interrogatory, he says:

Yes. In most of the sales such an analysis is furnished [516] by the seller. Very often however such an analysis is not required by the buyer as there are only two glucose manufacturers in Argentina who both elaborate a standard product corresponding to the U. S. Pharmacopea.

To the Seventeenth Interrogatory, he says:

No, as no other glucose is manufactured over here.

To the Eighteenth Interrogatory, he says:

We exported between the 1st day of May 1946 and the 1st day of May 1947 approximately 1475 tons of glucose. We obtained the export license from the Secretaria de Industria y Comercio, Direccion de Importacion y Exportacion, paying the corresponding fee of $1\frac{1}{2}\%$ sales tax and expenses for stevedoring, custom house brokers and bank expenses.

(Plaintiff's Exhibit 60-E—(Continued))

To the Nineteenth Interrogatory, he says:

Yes. If contracts are made under the rules of the Bolsa de Comercio, it is a practice to ask for the arbitration under the rules of this Bolsa. Until the decision of the arbiters has been announced to the parties, the merchandise cannot be disposed of. If a contract has been made not under the rules of the Bolsa de Comercio, law suit has to be filed with the ordinary Civil Court; the same in this case the merchandise cannot be disposed of unless a specific order to this effect has been given by the competent judge. [517]

Answers by Juan K. Lang to
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

(a) My firm has never been a manufacturer of glucose; my firm is an exporter of glucose.

(b) I am since ten years manager and partner of Eugenio Lang S.R.L.; before that I was six years manager and partner of Eugenio Lang, and before that I was five years employed by several export firms.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) Yes.

(b) I am since ten years partner of Eugenio Lang S.R.L. I know since five years Sociedad Industrial Financiera Argentina SIFAR S. A., since

(Plaintiff's Exhibit 60-E—(Continued)

nine years R. H. Gonzalez y Cia. and since two years Plaintiff.

(c) Yes.

(d) I know on a purely commercial basis, Mr. Ditisheim and M. Dautz of Sociedad Industrial Financiera Argentina SIFAR S. A.; Mr. Ricardo Gonzalez of R. H. Gonzalez y Cia., Mr. Berger of the Plaintiff, and all the other partners of my own Company and I know these gentlemen since the time mentioned in point (b).

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 4), he says: [518]

(a) A place where businessmen come together in order to buy and sell commodities.

(b) There are two exchanges in Buenos Aires, a small one dealing exclusively in spot lots of cereals, the Bolsa de Cereales, and a much larger one dealing in all commodities and stocks called Bolsa de Comercio de Buenos Aires.

(c) Both are privately owned.

(d) They are not competitive as one deals only in spot lots of cereals.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) No glucose is manufactured from sugar cane and beets.

To the Fifth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) No glucose is manufactured in Argentina

(Plaintiff's Exhibit 60-E—(Continued))

from sugar cane. The export of glucose made from corn was during 1946, 8.014 tons. I don't know exactly the domestic consumption, carry-over and balance of corn glucose during the years 1946 and 1947. I estimate however that the local consumption was about 18 to 19.000 tons and the carry-over at the end of 1946 about 3 to 5.000 tons.

To the Sixth Cross-Interrogatory (to Plaintiff's Interrogatory No. 9), he says:

(a) No prices are published at the Bolsa de Cereales for Argentina corn glucose. In my own opinion the prices were in [519] May 1946, 1.15 to 1.22 for asked and 1.13 to 1.20 for bid; in the month of June 1946 prices applied without any change. July, August, September 1946, no sales, no operations, no prices. October 1946, 61 to 62 centavos; November 1946, 61 centavos; December 1946, 60 to 61 centavos; January 1947, 58 to 60 centavos; February 1947, 56 to 58 centavos; March 1947, 55 to 56 centavos; April 1947, 52 to 53 centavos. I want to add that from July till September 1946 no sales at all were made so that no bid was available at any price; only beginning from October 1946 some minor transactions were made at prices about 61 to 62 centavos. However the prices indicated from October 1946 to April 1947 are also only asked prices with no bid as operations were extremely reduced and no buying interest existed.

(Plaintiff's Exhibit 60-E—(Continued))

To the Seventh Cross-Interrogatory (to Plaintiff's Interrogatory No. 18), he says:

(a) Yes.

(b) Yes.

(c) We made the following export shipments all for pure corn glucose testing from 43° to 45° Baume packed in wooden barrels: in May 1946, 62,680 kg to the U.S.A.; 128,401 kg. to Switzerland; 24,784 kg to Palestine—in June 1946, 54,776 kg to the U.S.A.; 74,866 kg to Switzerland; 46,390 kg to Palestine—in July 1946, nothing—in August 1946, 104,310 kg to the U.S.A.; 59,699 kg to Switzerland—in September [520] 1946, 97,822 kg to the U.S.A.; 6,150 kg to Switzerland; 47,849 kg to Palestine—in October 1946, 84,804 kg to the U.S.A.—in November, 1946, 178,675 kg to the U.S.A.—in December 1946, 15,341 kg to the Philippines—in January 1947, 99,478 kg to Italy—in February 1947, 9,598 kg to Palestine; 2,904 kg to the Philippines; 50,066 kg to Italy—in March 1947, 84,526 kg to Switzerland; 19,325 kg to Palestine; 64,930 kg to Italy; 98,381 kg to India—in April 1947, 49,865 kg to Switzerland; 9,901 kg to Palestine. The rules of my firm do not allow me to indicate at what prices and to whom we have sold the quantities mentioned above.

(d) As exports of corn glucose can only be made with an export license, we had for each delivery such an export license in our hands. The licenses are issued by the Secretaria de Industria y Co-

(Plaintiff's Exhibit 60-E—(Continued))

mercio, Direccion de Importacion y Exportacion, and as they have to be returned afterwards we cannot indicate the numbers and dates of these licenses.

In answer to the first part of the question, I would like to say that we have delivered and shipped all our sales of glucose at the dates mentioned above. [521]

PLAINTIFF'S EXHIBIT 60-F

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S. A., a Corporation

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Deposition of Angel Gabriel, taken before me, Jones R. Trowbridge, Consul of the United States of America, at Buenos Aires, Argentina, at 14:30 p.m. on November 24, 1947, under authority and by virtue of a commission issued out of the District

Plaintiff's Exhibit 60-F—(Continued)

Court of the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Angel Gabriel, could not intelligently testify in the English language, one Clara Robine, of Avda. R. Saenz Pena 530, Buenos Aires, Sworn Public Translator, who also well understands the Spanish and English languages, was employed as interpreter and was sworn in as follows:

“You do solemnly swear that you know the English and the Spanish languages and that you will truly [522] and imparitally interpret the oath to be administered and interrogatories and cross-interrogatories to be asked Angel Gabriel, a witness, now to be examined, out of the English into the Spanish language, and that you will truly and impartially interpret the answers of the said Angel Gabriel thereto out of the Spanish language into the English language. So help you God.”

and said Clara Robine interpreted accordingly.

The answers of the witness, Angel Gabriel, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Angel Gabriel, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being

Plaintiff's Exhibit 60-F—(Continued)

then read over correctly to the said witness by me was then signed by the said witness in my presence.

Angel Gabriel, of 25 de Mayo 67, Buenos Aires, Argentina, stevedore, 32 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the [523] truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says:

Answers by Angel Gabriel to
Interrogatories

To the First Interrogatory, he says:

My name is Angel Gabriel; 32 years of age. Residence: 25 de Mayo 67, Buenos Aires, Argentina. Occupation: I have a firm for loading and unloading steamers. I am associated with my father, Blas Gabriel in this business.

To the Second Interrogatory, he says:

I have been a member of the firm of Gabriel & Cia., located in Buenos Aires, for the last nine years. The firm handles part of the cargo of approximately (1500-1800) (M. Gabriel) different (JRT) steamers per year.

To the Third Interrogatory, he says:

I do not know either the plaintiff nor the defendant, but I do know by name the plaintiff.

Plaintiff's Exhibit 60-F—(Continued)

To the Fourth Interrogatory, he says:

There is no government authorization required for this business; I only registered as a trader in the Registro Publico de Comercio of Buenos Aires.

To the Fifth Interrogatory, he says:

I do not know all the expenses; I can only answer partially. [524] I know that in transfer from F.A.S. to F.O.B. a sales tax of $11\frac{1}{4}\%$ over the selling price of the merchandise has to be paid. A tax of 5 0/00 for getting the export permit has also to be paid. (For each thousand pesos Argentine currency of merchandise, it is necessary to pay 5.00 pesos Argentine currency for the export permit). My stevedoring charges are 0.70 cents Argentine currency per barrel; nightwork and holidays have 50% surcharge.

To the Sixth Interrogatory, he says:

I only know as much as I said in my answer to interrogatory No. 5. We only charge this merchandise by barrel and not by ton. We consider each barrel containing from 300 to 320 kilos. As far as I know my competitors charge more or less the same prices.

To the Seventh Interrogatory, he says:

About this point I have no knowledge, except what I stated about stevedoring charges.

Answers by Angel Gabriel to
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

Plaintiff's Exhibit 60-F—(Continued)

(a) I have always worked on the same line, that is loading and unloading of merchandise from and to steamers.

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says: [525]

(a) I only know as clients of our firm Sociedad Industrial Financiera Argentina (SIFAR) and Eugenio Lang.

(b) I have known the directors in Eugenio Lang for eight years. As to Sociedad Industrial Financiera Argentina (SIFAR) although clients of ours, I do not know any particular person.

(c) I have answered this interrogatory under (b).

(d) In Eugenio Lang I have known Messrs. Eugenio Lang and Juan Lang for eight years.

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) The source of my knowledge is the experience I have had in conducting my business.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) The costs, taxes and expenses which I mentioned in answer to interrogatory No. 6 do not change according to the size of shipment.

(b) In answer to this question I can only repeat what I have mentioned in my answer to direct interrogatory No. 5 and No. 6.

(c) I have no knowledge as to costs and taxes. As to our concern there has been an increase from

Plaintiff's Exhibit 60-F—(Continued)

0.70 cents Argentine currency to 0.85 cents Argentine currency per barrel, in February 1947. [526]

/s/ CLARA ROBINE

Interpreter

/s/ A. GABRIEL

ANGEL GABRIEL

Witness

/s/ JONES R. TROWBRIDGE

Consul of the

United States of America

PLAINTIFF'S EXHIBIT 60-G

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S. A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES AND CROSS-INTERROGATORIES

Deposition of Ladislao Lakatos, taken before me,
Jones R. Trowbridge, consul of the United States
of America, at Buenos Aires, Argentina, at 10:15
a.m. on November 25, 1947, under authority and

Plaintiff's Exhibit 60-G—(Continued)

by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Ladislao Lakatos, did well understand the English language, I, Jones R. Trowbridge, Consul of the United States, who also well understand the said language, administered the oath and the interrogatories and cross-interrogatories were put to him in the English language.

The answers of the witness, Ladislao Lakatos, to said [528] interrogatories and cross-interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Ladislao Lakatos, a witness now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Ladislao Lakatos of 25 de Mayo 267, Buenos Aires, Argentina, broker, 59 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-

Plaintiff's Exhibit 60-G—(Continued)
interrogatories now to be put to you. So help you
God."

deposes and says:

Answers by Ladislao Lakatos to
Interrogatories

To the First Interrogatory, he says:

My name is Ladislao Lakatos, 59 years of age.
Residence: 25 de Mayo 267. Occupation: Broker.

To the Second Interrogatory, he says: [529]

I have been broker in the City of Buenos Aires
for the last 32 years. The same residence in Buenos
Aires. I have been associated with Mr. Pablo Pels
in the firm of Pels & Lakatos from 1916 to 1926;
from 1926 to date under my own name and signa-
ture of L. Lakatos. The amount of money earned
in my firm is about 25,000 to 100,000 pesos Argen-
tine currency a year. I have moved between 20,000
to 100,000 tons of produce a year.

To the Third Interrogatory, he says:

I do not know either of them other than by name.

To the Fourth Interrogatory, he says:

There are no licenses or authorizations necessary
for the general business in Argentina, but I am in-
scribed in the Comision Nacional de Granos y Ele-
vadores, which governs the grain and seed trade of
the Argentina, under No. 812. I am a member of
the Bolsa de Comercio and I am a member of the
Bolsa de Cereales; I am also a member of the
Grain Trade Chamber of Buenos Aires.

Plaintiff's Exhibit 60-G—(Continued)

To the Fifth Interrogatory, he says:

I do.

To the Sixth Interrogatory, he says:

1½% for export permit, 1¼% for sales tax 3 o/oo statistical tax. ½% brokerage. About 1% banking expenses and 0.80 cents Argentine currency a cask for the material being put on board. They calculate normally 5% [530] between F.A.S. and F.O.B.

To the Seventh Interrogatory, he says:

The cost of cooperage was about 30.00 pesos Argentine currency each, or say about 100.00 pesos Argentine currency a ton, one year and a half ago. The cost of delivery from Buenos Aires market to free at shipside would be 7.00 pesos Argentine currency the ton. From Buenos Aires harbor to F.O.B. Buenos Aires harbor would be those 5% which I mentioned in the previous question.

Answers by Ladislao Lakatos to
Cross-Interrogatories

To the First Cross-Interrogatory (to Plaintiff's Interrogatory No. 2), he says:

(a) Before I went to partnership with Mr. Pels, I was employed from 1910 to 1916 with Messrs. Bunge & Born, and Molinos Rio de la Plata, Argentina. My last job having been manager of Molino Nogoya (flour mill): Before that I had been employed by Messrs. Bunge & Born for five years in Europe.

Plaintiff's Exhibit 60-G—(Continued)

To the Second Cross-Interrogatory (to Plaintiff's Interrogatory No. 3), he says:

(a) I did. I did business as a broker with Sociedad Industrial Financiera Argentina (SIFAR) and with Messrs. Eugenio Lang.

(b) I know in Sociedad Industrial Financiera Argentina [531] (SIFAR) Mr. Tillman, one of the directors, and Mr. Dittisheim, one of the managers, Mr. Hertan, another of the directors, for quite a number of years. Mr. Juan Lang of Eugenio Lang I also know personally, more or less since they arrived in Argentina ten or twelve years ago.

(c) Yes. Stated in answer to interrogatory (b).

(d) With the persons mentioned above I am having telephone conversations on business several times a week, but I do not see them personally sometimes for months. My relationship is purely commercial.

To the Third Cross-Interrogatory (to Plaintiff's Interrogatory No. 5), he says:

(a) My source of information is experience as a broker of 30 years.

To the Fourth Cross-Interrogatory (to Plaintiff's Interrogatory No. 6), he says:

(a) Between 50 tons and 275 tons the cost would be always proportional and would not be augmented or diminished in any appreciable amount.

(b) See my answer to interrogatory No. 6; exact and itemized reply.

Plaintiff's Exhibit 60-G—(Continued)

(c) Taken on a percentage basis since costs and taxes have not varied in the period of May 1, 1946 to May 1, 1947. The only thing which has been augmented is the cost of stevedoring on board, which must have risen from 0.70 to [532] 0.80 cents Argentine currency each cask to 1.00 peso to 1.20 Argentine currency each. On the other side, as prices of liquid glucose have fallen violently in said period, the absolute cost of this operation has been reduced by about 50%. I might add that prices of glucose previous to May 1946 have been over 1.00 peso Argentine currency per kilo, and by end of the year they have fallen to less than 0.50 cents Argentine currency per kilo. Concerning the Argentine market for glucose during the year May 1, 1946 to May 1, 1947, I attach hereto a statement marked Exhibit "A".

/s/ L. LAKATOS

LADISLAO LAKATOS

Witness

/s/ JONES R. TROWBRIDGE

Consul of the

United States of America

This Exhibit, in three pages, marked "A" was produced by Witness Ladislao Lakatos, in connection with his answer to Cross-Interrogatory No. 4 (to Plaintiff's interrogatory No. 5), and by him

Plaintiff's Exhibit 60-G—(Continued)

deposed unto and subscribed by him at the time of his examination before the undersigned,

/s/ JONES R. TROWBRIDGE

Consul of the

United States of America.

November 25th 1947

The elaboration of corn syrup—liquid glucose 43/45° [533] Be—was for quite a time a monopoly of a northamerican concern, local branch of the Corn Products refining Company of U.S.A., who sold their entire output, locally. Nobody thought about export.

About the same time that this company has been put on the United States Proclaimed List of Certain Blocked Nationals, during the last war—as I recollect early in 1943—a new factory started to produce, in Rio 2.o, Province of Cordoba, owned by the well known northern industrialists, Messrs. Pezza; under the then prevailing circumstances, their start resulted extraordinarily favourable, because about the same time inquiries began to appear also for export, absorbing all they could produce. By this time, the production of both existing factories amounted to about a hundred tons a day.

The blacklisted factory still sold its production to local consumers, and according to their sales policy, which they still follow, kept the prices low. The other factory, even if interested up to a certain point in assuring for itself part of the local busi-

Plaintiff's Exhibit 60-G—(Continued)

ness, was from the start selling most of their output to export.

Corn was a glut on the local market up to the end of war in Europe; cornsyrup prices kept on accordingly at about 300 pesos a ton, including wooden casks, nett weight.

As recently as April 1945, I did business at 350 pesos a [534] ton, delivered f.a.s. steamer in the Port of Buenos Aires.

The later evolution of prices, according to my records, was as follows:

May 1945	Pesos 375.—per 0/00 kg
June	500.—
July	600.—
August	630.—
September	650.—
October	750.—
January 1946	780.—
February	800.—
March	1000.—
April	1050.—
May	1200.—

after which date, prices remained stationary, without business, as the trade was waiting for regulation of exports by the new, Peron, government, dedicated at that moment to a campaign for reduction of the cost of subsistence, and there were no new export permits forthcoming, although permits for sales up to the end of May have been conceded

Plaintiff's Exhibit 60-G—(Continued)

and these were exported accordingly.

This situation was resolved by September 1946; but by that time, the international market for cornsyrup became weaker, competitors from U.S.A. started offering at prices lower than argentine producers were asking; the more so, as [535] in April/May 1946 on account of some extraordinary purchases by an outsider, the market went to unusual heights and speculators purchased all available quantities to be produced up to March 1947 at the then prevailing prices, vis: Pesos 1200.—a ton.

In the meantime, Refinerias de Maiz raised their prices for local consumption (in iron containers to be returned) not higher than 650 Pesos a ton and their selling price today is at about 450 Pesos a ton. Today, prices for export and local consumption are at parity again; especially so on account of old stocks which are glutting the market and are not taken for export any more, as they became yellow and milky in colour, which the export market does not fancy; everybody is asking for crystal clear.

This business, on account of its relative unimportance in concentrated in very few hands; I might say that apart from the two producers, not more than half a dozen jobbers, four or five brokers and not more than twenty exports have been dealing in cornsyrup; the intervention of the local commodity exchanges (there are two of them in Buenos

Plaintiff's Exhibit 60-G—(Continued)

Aires, one each in Rosario, Santa Fe, Bahia Blanca and Parana) has been reduced to the registering of contracts, obligatory according to the actual stamp-tax law.

Most of the contracts have been subject to arbitration clauses by the Bolsa de Coercio de Buenos Aires (Buenos [536] Aires Trade Exchange) which is the most important of them; on its premises all kind of general business is transacted, while the others deal only in grain and oilseeds. I understand that non fulfillment of contracts of cornsyrup has produced quite a chain of demands, as several contracts have changed hands on rising prices. Some of the jobbers have suffered very heavy losses, as their contracts have not been taken up when prices started to fall.

/s/ L. LAKATOS [537]

Mr. Rowe: I think that is right.

The Court: I will order these transcribed into the record and I will read them before we conclude the case and possibly before tonight.

Mr. E. B. Stanton: That is the plaintiff's case, your Honor.

The Court: We will take a short recess, then, gentlemen.

(Short recess.)

The Court: Go ahead, gentlemen.

Mr. L. B. Stanton: One matter, your Honor, that the clerk brings my attention to, and that is the fact we had——

The Court: I did not hear you.

Mr. L. B. Stanton: One matter that the clerk calls to my attention, and that is there was a notice for a preliminary trial which was set over until the date of trial.

The Court: Pre-trial?

Mr. L. B. Stanton: No. That referred to the averment in Paragraph I of the answer to the two causes of action. I think that relates to the fact that the plaintiff did not file their articles of incorporation or domesticate, therefore, they were barred.

The Court: Yes. Well, that is a question of law. All of these questions are questions of law which we can [538] consider at the conclusion of the testimony.

Mr. L. B. Stanton: I just thought I would call the court's attention to it at this time.

The Court: I think we will drop it and say the motion will be denied without prejudice to raising the same point on the argument. That clears your record. Is that all right?

Mr. Bronson: It is quite all right with us, your Honor.

The Court: All right, gentlemen, that brings us up to date.

Mr. Bronson: I understand that the plaintiff has rested its case.

The Court: The plaintiff has rested, yes.

DEFENDANT'S CASE IN CHIEF

Mr. Bronson: In the defense, if your Honor please, first, we offer into evidence the deposition of Ralph Heymsfeld, some of the exhibits to which and some excerpts from the body of which have already been placed in evidence.

The Court: That is all right.

Mr. Bronson: I offer the deposition in evidence.

Mr. L. B. Stanton: We offered part of it.

The Court: All right.

Mr. Bronson: Now, Judge, I don't know what method you [539] adopt in this case. They have excerpted certain portions. Now I am offering the entire amount.

The Court: That is all right; you can offer the entire amount of the remainder and they can indicate to me any portion they object to.

Mr. Bronson: Yes.

The Court: Now I will receive that as your exhibit.

Mr. Bronson: That is right.

The Court: Excepting the portions which they have already read into the record.

Mr. Bronson: That is right.

The Court: How about the exhibits, however?

Mr. Bronson: All exhibits are in the first volume. We are offering that also.

The Court: Then we can take the exhibits in the volume as one exhibit.

Mr. Bronson: That is right.

The Court: Whatever is left.

Mr. Bronson: That is right.

The Court: Those that have not been received.

Mr. Bronson: That is the effect of our offer.

The Clerk: Your Honor, it is my understanding that there are two depositions of that gentleman, one dated October 22, 1947 and the other, October 30, 1947.

Mr. Bronson: That is correct. [540]

The Clerk: And there are two groups of exhibits. I believe one came in with each deposition. Which is being offered?

The Court: Both.

Mr. Bronson: Both.

The Court: Give them different numbers, then, as to the dates. You arrange them according to dates.

The Clerk: Defendant's Exhibit R in evidence is the deposition dated October 22, 1947, filed January 6th, 1948.

Mr. L. B. Stanton: In order not to encumber the record, your Honor, I presume the exhibits in that deposition which are already in evidence will not be renewed in there?

The Court: That is right. The exhibits which have not been offered are received together as one exhibit. We won't take the trouble to mark them alphabetically.

Mr. L. B. Stanton: What I am getting at, there are a number of exhibits from there that have already been offered in evidence.

The Court: I understand that.

Mr. L. B. Stanton: The exhibits will not be again admitted.

The Court: No, no. They are excluded because they already have a number.

The Clerk: The exhibits to this deposition dated October 8, 1947, [541] are marked Defendant's Exhibit R-1.

Mr. Bronson: Did you give the right date for that, October 8th?

The Clerk: It is so indicated on the cover.

Mr. Bronson: All right. All right; I am satisfied with that.

The Clerk: It appears that this is the date the exhibits were put into this folder.

Mr. Bronson: All right.

The Clerk: It also bears the file date of January 6, 1948.

Mr. Welbourn: You stated the deposition was dated October 22nd.

The Court: Give the file date.

The Clerk: Both of them were filed January 6th.

The Court: Filed the same date?

The Clerk: Yes. The deposition taken October 30, 1947 is marked Defendant's Exhibit R-2 in evidence; and the volume of exhibits accompanying this deposition is marked Defendant's Exhibit R-3 in evidence.

(Defendant's Exhibits R and R-1 read in words and figures as follows:)

(Defendant's Exhibit R-2 set out on pages 775 to 810 and Defendant's Exhibit R-3 set out on pages 811 to 876.)

DEFENDANT'S EXHIBIT R

In the District Court of the United States for the
Southern District of California

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S. A., a corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

Deposition of Ralph T. Heymsfeld, called in be-
half of the Plaintiff, pursuant to notice, under Rule
30, taken before James B. Kilsheimer, Jr., a Notary
Public, at his office, Number 10 East 40th Street,
City, County and State of New York, on Wednes-
day, October 22, 1947, commencing at 10:30 o'clock
in the forenoon.

Appearances:

STANTON & STANTON, ESQS.,

Attorneys for the Plaintiff,

By HARRY S. MESIROV, ESQ.,
of Counsel.

BRONSON, BRONSON & McKINNON,
ESQS.,

Attorneys for the Defendant,

By CHARLES PICKETT, ESQ.,

For CHADBOURNE, WALLACE,

PARKE & WHITESIDE, ESQS.,
of Counsel.

It Is Stipulated By and Between the Plaintiff

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

and Defendant, by their counsel here appearing, that the original deposition of the witness being examined may remain in the hands of James B. Kilsheimer, Jr., Esq., Notary Public, at his office at 10 East 40th Street, New York City, for review and signature by the witness and for the completion of the notarial certificates, and if the deposition, together with such corrections as the witness may desire to make, is not signed by the time of trial, it may be used by either side with the same force and effect as though it had been signed and all formalities complied with.

It Is Further Stipulated that in case the witness refuses to answer a question, it shall not be necessary for the Notary Public to repeat that question and to obtain the witness' refusal to answer.

It Is Further Stipulated that the deposition of this witness is being taken under the same notice and proof of service which was incorporated in the depositions taken on Wednesday, October 8, 1947, the adjournment of the examination of this witness to this time being by stipulation of counsel, duly entered in the District Court of the United States for the Southern District of New York. [544]

RALPH T. HEYMSFELD

called as a witness, being first duly sworn by the Notary Public, testified as follows:

Direct Examination

By Mr. Mesirov:

Q. Mr. Heymsfeld, what is your occupation?

EXHIBIT R—(Continued)

(Testimony of Ralph T. Heymsfeld.)

A. I am an attorney.

Q. Do you hold any position with Schenley Distillers Corporation, the defendant in this case?

A. Yes. I am general counsel of the corporation. I am also secretary. And I am a director of the corporation.

Q. And I suppose you are devoting your entire time to your duties with the corporation?

A. That is correct, sir.

Q. If satisfactory to you and your counsel, for purposes of brevity, we will refer to the plaintiff as "Engraw" and to the defendant as "Schenley" instead of using their respective corporate titles in full.

Mr. Pickett: That is quite all right, Mr. Mesirov.

Q. (By Mr. Heymsfeld): I understand that Schenley is a parent corporation having a number of subsidiaries? A. That is correct.

Q. Will you state the names and the location of those subsidiaries?

A. It is a long list, which I don't have in mind.

Mr. Pickett: Do you want all the subsidiaries? They [545] are very voluminous.

Mr. Mesirov: Well, it would be just as easy to give them all.

(Discussion off the record.)

Q. You will furnish such a list to me?

A. That is correct, sir.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Testimony of Ralph T. Heymsfeld.)

Q. Are you likewise general counsel, secretary and director of the subsidiaries?

A. I am not a director of any of the subsidiaries. I am general counsel of all of the American subsidiaries and I am secretary of most of the corporations, but not of all.

Q. You might, for convenience, in supplying the list of subsidiaries, also state the office which you hold in each.

A. I will do that.

Q. You have just made a distinction between American and other subsidiaries. Have you any subsidiaries in South America?

A. No.

Q. The District Court of the United States for the Southern District of California, Central Division, has issued an order against Schenley for the production of the following documents:

1. All telephone calls relating to this [546] transaction between Schenley and Whipple and as between the San Francisco offices of Schenley and their Cincinnati offices. I might say here that the transaction referred to is the present suit of Engraw against Schenley.

2. All reports made by the San Francisco offices to the Eastern offices, letters, correspondence, telegrams or inter-office communications between Donnelly and their executive offices.

3. Written instructions to Woolsey from any executive office and record of all telephone calls between Woolsey and any executive office.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

4. All correspondence between the San Francisco offices and the Eastern offices relative to the May 23rd letter or as to negotiations concerning the glucose contract.

5. Written report by Donnelly and Baglin concerning the glucose transaction, to the executive offices or attorneys, in preparation for this.

I have agreed with your counsel that you may produce at this time the originals or photostatic copies of those documents and that their production here, for purposes of examination and copying, will be in satisfaction of the order made by the Court to produce them in California.

Do you have those documents with you?

A. Yes. They are in the possession of counsel.

Q. Will you produce them? [547]

Mr. Pickett: We will produce what we have here.

(Discussion off the record.)

Mr. Pickett: I have here what I am informed are notes of a telephone conference between Mr. Donnelly, of the San Francisco office, and Mr. Whipple. That you can have, sir. I may say that I am advised that those are notes of a conversation held on the 14th day of May, 1946.

Mr. Mesirov: Mark it for identification.

(Notes of telephone conference of May 14, 1946 between Mr. Donnelly and Mr. Whipple)

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

marked Plaintiff's Exhibit 7-N for Identification.)

Mr. Pickett: And there is also here a document, which I will hand you in a moment, Mr. Mesirov, showing an entry on a telephone scratch pad for the 15th day of May, 1946, which relates to 7-N for Identification, and this document also contains a similar telephone scratch pad entry for the 3rd day of June, 1946.)

(Discussion off the record.)

Mr. Pickett: I don't know whether the telephone conference referred to on the left hand side of that was held on the 3rd of June, the 2nd of June or the 4th of June.

Mr. Mesirov: Mark it for identification.

(Telephone scratch pad entries above referred to marked Plaintiff's Exhibit 8-N for Identification.)

Mr. Pickett: Next, I have, Mr. Mesirov, a document [548] which is a bill of the Pacific Telephone and Telegraph Company dated June 6, 1946, addressed to Schenley Distilleries, Inc., consisting of four pieces of paper. This lists all of the long distance telephone calls, I am informed, during the period mentioned by the bill, and I am advised that any long distance telephone calls which Mr. Donnelly would have made during that period will be reflected on this bill.

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Bill of Pacific Telephone and Telegraph Company to Schenley, June 6, 1946, marked Plaintiff's Exhibit 9-N for Identification.)

Mr. Pickett: Next, Mr. Mesirov, I have three documents, clipped together, headed "Copy of vendor's bill," the vendor being stated as Pacific Tel & Tel. The date is June 11, 1946. These three documents cover the period from May 20th to some time in July, I think the latest date is the 2nd of July. The bill was rendered to Schenley Distilleries Corporation, San Francisco, California, and I am advised that this bill would reflect all long distance telephone calls made by Mr. Robert H. Baglin during the period mentioned by the bill.

(Bill, Pacific Tel & Tel Co., to Schenley, June 11, 1946, marked Plaintiff's Exhibit 10-N for Identification.) [549]

Mr. Pickett: Now I have something more as to telephone calls, and this next paper refers to telephone calls made by Mr. Woolsey.

The paper, I may say, does not bear Mr. Woolsey's name. These items listed on this paper are excerpts from a report made by Mr. Woolsey, who is a lawyer under the supervision of Mr. Heymsfeld, to Mr. Heymsfeld, on his daily legal work.

I have taken from the report, which contains a great deal of matter which has nothing to do with this case, those excerpts which relate to telephone calls made by Mr. Woolsey, having to do with the

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

transaction which is the subject of suit. You will notice that in two places I have inserted asterisks. The asterisks relate to the substance of what I deem to be confidential communications between Mr. Donnelly and Mr. Woolsey, as attorney.

Q. (By Mr. Mesirov): Mr. Heymsfeld, Mr. Pickett has just handed me the memorandum which he has just described. Will you tell me who has possession of the original report from which this memorandum was made up?

A. I have the original, and Mr. Woolsey has a copy of it in San Francisco.

Mr. Mesirov: Mark it for identification.

(Paper containing excerpt from a report by Mr. Woolsey to Mr. Heymsfeld marked Plaintiff's [550] Exhibit 11-N for Identification.)

Mr. Pickett: Next, I have a copy of a memorandum from R. H. Baglin in the San Francisco office to Mr. C. Balzer dated May 20, 1946.

I have no extra copy of this.

Mr. Mesirov: Mark it for identification.

(Memorandum, R. H. Baglin to C. Balzer May 20, 1946, marked Plaintiff's Exhibit 12-N for Identification.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, referring to this memorandum which has just been produced and marked Plaintiff's Exhibit 12-N for Identification, will you tell us who Mr. C. Balzer is?

A. Mr. Balzer is an employee of the production department.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. Where? A. He is presently——

Q. Where was he at that time?

A. At that time he was in Cincinnati.

Q. May, 1946? A. In Cincinnati.

Mr. Pickett: Next, I have a copy of a letter addressed to Harold A. Whipple Co. dated May 20, 1946, by Mr. R. H. Baglin. This is a photostat of the office copy. Of course, [551] the original presumably is in the office of Harold A. Whipple Company.

(Letter, R. H. Baglin to Harold A. Whipple Co., May 20, 1946, marked Plaintiff's Exhibit 13-N for Identification.)

Mr. Pickett: I now produce a letter, consisting of two pages, on the letterhead of Harold A. Whipple Co., addressed to Schenley Distilleries Corp., dated May 21, 1946. This letter is directed to the attention of Mr. R. H. Baglin.

Mr. Mesirov: Mark it for identification.

(Letter, Harold A. Whipple Co. to Schenley, attention of Mr. Baglin, May 21, 1946, marked Plaintiff's Exhibit 14-N for Identification.)

Mr. Pickett: Next, sir I produce a *telephone* dated May 21, 1946 addressed to Carl J. Kiefer, Schenley Distilleries Corp., signed J. B. Donnelly. I may say, sir, that I have two copies of that same telegram.

One appears to be the telegram as actually re-

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

ceived by Mr. Kiefer and the other seems to be an office copy. I don't imagine we have to mark both.

Mr. Mesirov: Mark the original.

(Telegram, Mr. Donnelly to Mr. Kiefer, May 21, 1946, marked Plaintiff's Exhibit 15-N for Identification.) [552]

Mr. Pickett: Next, I produce a letter on the letterhead of Harold A. Whipple Co. dated May 23, 1946, bearing a mark "May 24, Recd" addressed to Schenley Distilleries Corp. and signed "Harold A. Whipple Co., Harold A. Whipple."

This letter is addressed to the attention of Mr. Baglin.

(Letter, May 23, 1946, Harold A. Whipple Co. to Schenley, attention Mr. Baglin, marked Plaintiff's Exhibit 16-N for Identification.)

Mr. Pickett: Next, I produce an inter-office communication addressed to Mr. Carl J. Kiefer from J. B. Donnelly, bearing date May 23, 1946, with the stamp of receipt in the upper right hand corner as May 27, 1946. This communication consists of three pages, and a fourth page, which was an attachment.

Mr. Mesirov: Mark it for identification.

(Inter-office communication, May 23, 1946, Mr. Donnelly to Mr. Kiefer, marked Plaintiff's Exhibit 17-N for Identification.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, directing your attention to the photostatic copy of the

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

letter just produced, and just marked Exhibit 17-N, can you tell me what "Schenley Affiliates," which is at the top of the stationery, stands for?

A. That is a designation that we place on these inter-office communication forms, so that the sheets can be used interchangeably by the company and by all of the subsidiaries.

Mr. Pickett: I now produce a telegram dated May 27, 1946 addressed to J. B. Donnelly, Schenley Distilleries, Inc., signed "C. W. Metcalf."

Mr. Mesirov: Mark it for identification.

(Telegram, May 27, 1946, Mr. Metcalf to Mr. Donnelly, marked Plaintiff's Exhibit 18-N for Identification.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, what was Mr. Metcalf's position in Schenley on May 27, 1946?

A. He was employed as a consultant, principally on purchase of materials.

Q. As a regular employee or as an independent consultant?

A. I can't characterize it. He was not employed by Schenley exclusively. He had certain other business connections, which he continued.

Mr. Pickett: Next, I produce an original telegram dated May 27, 1946, addressed to C. W. Metcalf, Schenley Distillers Corporation and signed—I have to spell this to you, because the name is misspelled—"J. B. D-o-n-n-a-l-l-y." [554]

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Telegram, May 27, 1946, J. B. Donnally, to C. W. Metcalf, marked Plaintiff's Exhibit 19-N for Identification.)

Mr. Pickett: Next, I produce a copy of an inter-office communication addressed to Mr. I. J. Seskis from Carl J. Kiefer, dated May 28, 1946.

Mr. Mesirov: Mark it for identification.

(Inter-office communication, Mr. Kiefer to Mr. I. J. Seskis, May 28, 1946, marked Plaintiff's Exhibit 20-N for Identification.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, who is I. J. Seskis?

A. He was, and is, a vice-president of Schenley Distillers Corporation.

Q. Where? A. His office is in New York.

Mr. Pickett: Next, I produce a telegram dated May 28, 1946, addressed to J. B. Donnelly, Schenley Distilleries, Inc., and signed "Chas. Balzer, Schenley Distilleries, Inc." with a handwritten notation in the lower right hand corner of the telegram.

Q. (By Mr. Mesirov): Mr. Heymsfeld, who is Charles Balzer?

A. That is the same Mr. Balzer that was identified [555] by me before.

Mr. Mesirov: Mark it for identification.

(Telegram, May 28, 1946, Mr. Balzer to Mr. Donnelly, marked Plaintiff's Exhibit 21-N for Identification.)

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Next, I produce the original of an inter-company communication addressed to Mr. Chas. Metcalf, dated May 29, 1946, from Mr. Carl J. Kiefer. I may say, Mr. Mesirov, that we have found a copy of Exhibit 17-N, which undoubtedly was enclosed with the original of that memorandum.

Mr. Mesirov: To which this memorandum refers?

Mr. Pickett: That is correct.

Mr. Mesirov: Mark it for identification.

(Inter-company communication, May 29, 1946, Mr. Kiefer to Mr. Metcalf, marked Plaintiff's Exhibit 22-N for Identification.)

Mr. Pickett: Next, I produce an inter-office communication addressed to Mr. C. J. Kiefer, dated May 29, 1946 from C. W. Metcalf. This communication consists of a memorandum with two attachments, so it is three pages in all.

Mr. Mesirov: Mark it for identification.

(Inter-office communication, Mr. Metcalf to Mr. Kiefer, May 29, 1946, marked Plaintiff's Exhibit 23-N [556] for Identification.)

Mr. Pickett: Next, I produce a telegram addressed—and the name is misspelled; I will spell it as it appears here—"J. B. Donnely" Schenley Distilleries, Inc., dated May 31, 1946, signed Carl J. Kiefer. In the lower right hand corner of this telegram there is a handwritten notation.

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Telegram, May 31, 1946, Mr. Kiefer to “Mr. Donnelly” marked Plaintiff’s Exhibit 24-N for Identification.)

Mr. Pickett: Next, I produce an inter-office communication addressed to Mr. C. J. Kiefer dated June 3, 1946 from C. W. Metcalf.

Mr. Mesirov: Mark it for identification.

(Inter-office communication, June 3, 1946, Mr. Metcalf to Mr. Kiefer, marked Plaintiff’s Exhibit 25-N for Identification.)

Mr. Pickett: I will next produce a cablegram dated June 5th, addressed to Schenley Distillers, Cincinnati, Ohio, signed “Engraw.”

Mr. Mesirov: Mark it for identification.

(Cablegram, June 5, Engraw to Schenley, Cincinnati, marked Plaintiff’s Exhibit 26-N for Identification.) [557]

Mr. Pickett: Next, I produce a copy of a letter on the letterhead of Harold A. Whipple Co., dated June 5, 1946, addressed to Manny Blanc & Co., Inc., addressed to the attention of Mr. Bayles, at the bottom of which is a memorandum or letter beginning “Mr. Baglin:” and signed “Harold A. Whipple Co.” By “Harold A. Whipple.”

Mr. Mesirov: Mark it for identification.

(Letter, June 5, 1946, Harold A. Whipple Co. to Manny Blanc & Co., Inc., attention Mr. Bayles, marked Plaintiff’s Exhibit 27-N for Identification.)

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Next is an original teletype message addressed to C. W. Metcalf and signed Carl J. Kiefer. The document itself doesn't bear the date it was sent, but it says, "Rec'd Cinti"—which I take to be Cincinnati—"June 6th" and there is a pencil notation on it "1946."

Mr. Mesirov: Mark it for identification.

(Teletype message, Carl J. Kiefer to C. W. Metcalf, marked "Rec'd Cinti June 6," marked Plaintiff's Exhibit 28-N for Identification.)

Mr. Pickett: Next I produce a copy of a telegram addressed to Manny Blanc & Co., Inc. dated June 6, 1946, addressed to the attention of Mr. Bayles and signed "Jas. E. Woolsey."

Mr. Mesirov: Mark it for identification.

(Telegram, June 6, 1946, Mr. Woolsey to Manny [558] Blanc & Co., Inc., attention of Mr. Bayles, marked Plaintiff's Exhibit 29-N for Identification.)

Mr. Pickett: Next, I produce a document, consisting of two pages, headed "Memo of telephone conversation with Harold A. Whipple—June 6, 1946." At the bottom of this document is the typewritten name, "Jas. E. Woolsey."

Mr. Mesirov: Mark it for identification.

(Memo of telephone conversation with Harold A. Whipple, June 6, 1946, marked Plaintiff's Exhibit 30-N for Identification.)

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Next, I produce a copy of a telegram addressed to Harold A. Whipple Co. dated June 7, 1946 signed Schenley Distillers Corporation, by Jas. E. Woolsey, assistant secretary.

Mr. Mesirov: Mark it for identification.

(Telegram, June 7, 1946, Mr. Woolsey to Harold A. Whipple Co. marked Plaintiff's Exhibit 31-N for Identification.)

Mr. Pickett: Next, I have a cablegram addressed to Schenley Distillers dated June 7th, signed "Berger Engraw."

Mr. Mesirov: Mark it for identification.

(Cablegram, June 7th, Berger Engraw to Schenley Distillers, marked Plaintiff's Exhibit 32-N for Identification.)

Mr. Pickett: I have here a record of a telephone conversation between Mr. Woolsey and Mr. Heymsfeld, which is not noted on that document which I gave you before, and which has been marked Plaintiff's Exhibit 11-N for Identification. This is a memorandum of a telephone conversation on June 11, 1946.

(Handing paper to witness.)

I am going to ask Mr. Heymsfeld about this, so the record will be clear.

Q. (By Mr. Pickett): Mr. Heymsfeld, I show you the paper which I have just referred to and ask you whether it refreshes your recollection that you had a telephone conversation with Mr. Woolsey on that day.

A. Yes, it does.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. At that time, what was Mr. Woolsey's position?

A. Well, he headed what we call the Compliance Department in our San Francisco office, which was the department in charge of legal affairs, and worked under my direction.

Mr. Mesirov: Off the record.

(Discussion off the record.)

Q. (By Mr. Pickett): (Continuing) Did he report to you, as the head of Schenley's legal department? A. He did. [560]

Q. And, without telling us what this telephone conversation of June 11, 1946 was, will you state whether or not it related to a communication of facts to you or whether it was a communication with respect to certain legal relationships?

Mr. Mesirov: I object to this. If you want to refuse to produce it, it is your privilege to refuse, and we will try to get it. But I am not going to let you try to draw from the witness some sort of an explanation, which would justify a plea of confidential communication. You ought to be able to tell from the letter whether you want to claim privilege.

Mr. Pickett: I will withdraw that question.

Q. (By Mr. Pickett): (Continuing) Without telling us the substance of this telephone conversation of June 11th, 1946, will you state whether or not it was a communication which you had with Mr. Woolsey regarding legal aspects of a controversy between the parties to this suit?

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Mesirov: Objected to. A conversation of which you have a written memorandum must speak for itself.

Mr. Pickett: Will you answer the question?

The Witness: Will you read that question to me?

(Question read.)

A. Yes. [561]

Mr. Mesirov: Wait a minute. Before you answer it, I further object on the ground that it calls for a conclusion.

Mr. Pickett: Now, will you answer the question?

The Witness: Yes, is my answer.

Q. Did you have a conversation with Mr. Woolsey in your capacity as general counsel for Schenley? A. Yes.

Mr. Mesirov: Will you mark it, please?

Mr. Pickett: I was just about to say, Mr. Mesirov, it is our position that this is a confidential communication, and therefore we will not produce it for inspection. I don't believe it falls within the scope of what you informed me is the order of the Court.

Mr. Mesirov: I ask that it be identified for the purpose of a further call for the production of this memorandum.

Mr. Pickett: Mr. Mesirov, I don't know how more I can identify it. I have read the heading, the date, and the name at the bottom.

Mr. Mesirov: One question.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. (By Mr. Mesirov): Mr. Heymsfeld, how do you distinguish the words addressed to you by Mr. Woolsey—as being addressed to you in your capacity as counsel, or in your capacity as secretary of the company, or in your capacity as director of Schenley?

A. There would be no occasion for Mr. Woolsey to [562] address me on that subject at all as a director or secretary of Schenley. It didn't fall within the duties of either office. Besides, it was my telephone call to him, and I suppose what you are asking for is my state of mind as to what I was doing when I called him. I was acting in a legal capacity. I was calling him about this case.

Q. Do you mean to tell me that Mr. Woolsey, who was your assistant, was appealed to by you for a legal opinion in this case?

A. No, I didn't appeal to him for a legal opinion in the case—although the fact that he was my assistant wouldn't foreclose my asking him for his opinion. I always ask my assistants' opinions.

Q. Did you in this telephone conversation ask for his legal opinion?

A. In this telephone conversation I asked him as to the results of an investigation——

Mr. Pickett: Just a moment.

The Witness: What?

Mr. Pickett: I would like to remind the witness that the claim of privilege is going to be raised. The witness should not testify as to the substance of the conversation.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

The Witness: Could I say something off the record?

(Discussion off the record.) [563]

Q. (By Mr. Mesirov): Mr. Heymsfeld, this memorandum which was produced by your counsel was so produced because it related to the controversy at issue?

Mr. Pickett: No, sir, that is not correct. I would like to have the record clear on that. This memorandum is produced because it records a telephone conversation between Mr. Woolsey and Mr. Heymsfeld. You have informed me that the order in this case refers to telephone calls between Mr. Woolsey and any executive offices. I would not regard this telephone conversation as falling within the scope of the order, because I don't believe that it was a telephone call between Mr. Woolsey and any executive officer or any executive office. But, rather than have any question on the matter and because I haven't seen the order, and I am not familiar as to what took place in California, I am mentioning, for the sake of completeness, that there was such a telephone call on June 11, 1946. That is why the paper was produced.

Mr. Mesirov: And I am asking the witness now on whose behalf you are producing the paper, whether this paper relates to the glucose transaction.

Q. You can answer yes or no.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Oh, I would say it has some relation.

Mr. Mesirov: You are answering the question.

Mr. Pickett: You want him to answer?

Mr. Mesirov: Yes.

Mr. Pickett: (To the witness) Do you want to see the paper again?

The Witness: (Referring to paper) The paper is headed "Memo of telephone conversation with Mr. Heymsfeld re: Argentine glucose."

Q. (By Mr. Pickett): And the telephone conversation was in reference to the Argentine glucose, is that a fact? A. That is correct, sir.

Q. The substance of the communication you claim to be privileged? A. That is correct.

Q. And you decline to answer?

A. That is correct.

Q. You decline to give us the substance or exhibit this memorandum? A. That is correct.

(Discussion off the record.)

Mr. Pickett: Next, I produce an unsigned memorandum which is headed "File memorandum," dated June 11, 1946, that has in the lower left hand corner the initials "CWM:MB" which I understand are the initials of Mr. Metcalf.

Mr. Mesirov: Mark it for identification. [565]
(File memorandum, June 11, 1946, marked Plaintiff's Exhibit 33-N for Identification.)

Mr. Pickett: Next, I produce an unsigned

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

memorandum headed "File memorandum" dated June 13, 1946. I am informed that that is a memorandum which Mr. Metcalf made.

Mr. Mesirov: Mark it for identification.

(File memorandum, June 13, 1946, marked Plaintiff's Exhibit 34-N for Identification.)

Mr. Pickett: Next, I produce a letter on the letterhead of Stanton & Stanton dated June 24, 1946 addressed to Schenley Distillers Corporation, attention Mr. Metcalf, and signed Louis B. Stanton.

Mr. Mesirov: Mark it for identification.

(Letter, June 24, 1946, Stanton & Stanton, to Schenley Distillers Corporation, attention Mr. Metcalf, marked Plaintiff's Exhibit 35-N for Identification.)

Mr. Pickett: Next, I produce a copy of a letter dated June 26, 1946, addressed to Mr. L. Stanton, signed Schenley Distillers Corporation, C. W. Metcalf.

Mr. Mesirov: Mark it for identification.

(Letter, June 26, 1946, Schenley to Mr. L. Stanton, marked Plaintiff's Exhibit 36-N for Identification.)

Mr. Pickett: Next, I produce a copy of what I take to be a cablegram dated 7/3/46, addressed to the plaintiff and [566] signed "Schenley Metcalf."

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Cablegram, 7/3/46, from Schenley Metcalf to the plaintiff, marked Plaintiff's Exhibit 37-N for Identification.)

Mr. Pickett: Next, I produce a document headed "Inter-office memorandum" dated July 11, 1946, and at the bottom having the name, typewritten, "C. W. Metcalf."

Mr. Mesirov: Mark it for identification.

(Inter-office memorandum, July 11, 1946, with name of "C. W. Metcalf" typed at bottom, marked Plaintiff's Exhibit 38-N for Identification.)

Mr. Pickett: Next, I produce the original of the document headed "Inter-office communication" dated July 12th, 1946, and bearing Mr. Metcalf's initials, and the name, in typewriting, "C. W. Metcalf."

Mr. Mesirov: Mark it for identification.

(Inter-office communication, July 12, 1946, bearing Mr. Metcalf's name, marked Plaintiff's Exhibit 39-N for Identification.)

Mr. Pickett: Next, I produce the original of a memorandum headed "Schenley Affiliates, Inter-office communication" addressed to Mr. R. T. Heymsfeld, dated June 7, 1946, and bearing the typewritten signature of James E. Woolsey. [567]

Mr. Mesirov: Mark it for identification.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Inter-office communication, June 7, 1946, Mr. Woolsey to Mr. Heymsfeld, marked Plaintiff's Exhibit 40-N for Identification.)

Mr. Pickett: Next, I produce the original of a cablegram addressed to Schenley Distillers dated June 15, 1946 signed "Engraw."

Mr. Mesirov: Mark it for identification.

(Cablegram, June 15, 1946, Engraw to Schenley, marked Plaintiff's Exhibit 41-N for Identification.)

Mr. Pickett: Next, I produce a cablegram dated July 12, presumably 1946, addressed to "Metcalf, Schenley Distillers" signed "Engraw."

Mr. Mesirov: Mark it for identification.

(Cablegram, July 12th, Engraw to Metcalf, Schenley Distillers, marked Plaintiff's Exhibit 42-N for Identification.)

Mr. Pickett: Next I produce the original of a document, consisting of five pages, bearing the letterhead of plaintiff, from Mr. G. Fred Berger, to Mr. E. R. Dichter, dated August 2, 1946. If I recall correctly, a copy of this document has already been marked as an exhibit on a previous deposition.

Mr. Mesirov: That is right, this being the original of a copy shown to Emanuel R. Dichter and identified by him [568] and marked Plaintiff's Exhibit 6-N.

Mr. Pickett: The next document I have is an original letter from plaintiff address to Ralph

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Heymsfeld, Esq., dated September 18, 1946, and signed in the plaintiff's name by G. Fred Berger, president. I also have the envelope attached to the letter.

Mr. Mesirov: Mark it for identification.

(Letter, September 18, 1946, plaintiff, by G. Fred Berger, president, to Ralph Heymsfeld, with accompanying envelope, marked Plaintiff's Exhibit 43-N for Identification.)

Mr. Pickett: Next, I produce a copy of a letter to plaintiff, dated September 20, 1946, from the defendant, bearing Mr. Heymsfeld's name.

Mr. Mesirov: Mark it for identification.

(Letter to plaintiff from the defendant, by Mr. Heymsfeld, September 20, 1946, marked Plaintiff's Exhibit 44-N for Identification.)

Mr. Pickett: Next, I produce the original of a letter on the letterhead of plaintiff dated September 20, 1946, addressed to Ralph Heymsfeld, Esq., bearing what appears to be the signature of G. Fred Berger.

Mr. Mesirov: You don't mean to say that?

Mr. Pickett: Bearing what purports to be the signature of G. Fred Berger. [569]

Mr. Mesirov: The initial of the person who signed it is below it.

Mark it for identification.

(Letter, September 20, 1946, Plaintiff to

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Ralph Heymsfeld, marked Plaintiff's Exhibit 45-N for Identification.)

Mr. Pickett: Next, I produce the original of a letter bearing the letterhead of Mesirov & Leonards, dated October 29, 1946, addressed to Ralph Heymsfeld, Esq. and signed Harry S. Mesirov. I also produce the envelope in which that letter was sent.

Mr. Mesirov: Is that in accordance with our call, Mr. Pickett? I don't think you have any right to produce it here today, but I don't care. I wrote it. I don't deny it.

(Letter, October 29, 1946, Mesirov & Leonards to Ralph Heymsfeld, marked Plaintiff's Exhibit 46-N for Identification.)

Mr. Pickett: Next, I produce a copy of a letter to Harry S. Mesirov, Esq., dated October 31, 1946, signed Schenley Distillers Corporation, Ralph T. Heymsfeld.

Mr. Mesirov: Is that in response to our call? I don't see why you should produce it.

Mr. Pickett: If you don't want it I am not going to insist on having it marked. [570]

(Discussion off the record.)

Mr. Pickett: Mr. Mesirov., I have been going through these voluminous papers and I may have missed one or two, although I don't think so, which would fall within what you tell me is the order of the Court, and I will review this file again before you close the deposition of Mr. Heymsfeld, and if

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

I have any more that falls within the purview of what you tell me is the Court's order, of course I will produce it.

Q. (By Mr. Mesirov): Mr. Heymsfeld, are there any other memoranda or letters or other documents which you have not produced because you deem them to be confidential communications, outside of the one that you produced and refused to give the contents of?

A. My understanding was that we would produce all of the documents that fall within the call, without regard to whether or not they were confidential or privileged communications, that being our understanding of the rule, and that we would indicate what documents we refused to submit for your inspection, of the group of documents that we produced.

Q. Do I understand that your answer is that there are no other documents which you have failed to produce because you consider them confidential?

Mr. Pickett: Do you want me to answer that question, Mr. Mesirov? [571]

Mr. Mesirov: Yes.

Mr. Pickett: I said I will have to review this file again to see whether there are any documents falling within these five matters to which you refer as being contained in the court order, to make sure that we have produced them, and if we have them, I will produce them. If they happen to be confidential——

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Mr. Mesirov: Whether they be confidential or not.

Mr. Pickett: That is correct. You understand that I am not waiving any privilege. In other words, if the document is privileged, what we claim is privileged, we will raise the question.

Mr. Mesirov: The question was whether you will produce them. That is all.

Mr. Pickett: That is right.

Q. (By Mr. Mesirov): You have been subpoenaed to produce here all written, and memoranda of oral, instructions, telephone calls, and reports, and all correspondence, memoranda, telegrams and cables relating to the negotiations for the purchase and disposition of the glucose involved in this suit, which passed between and among the defendant corporation, its affiliates, its subsidiaries, its and their officers, agents and employees, the plaintiff, plaintiff's officers and agents, G. Fred Berger, Harold A. Whipple, Harold A. Whipple Co., [572] Joseph B. Donnelly, Robert H. Baglin, Ralph Heymsfeld, Emanuel R. Richter, Charles W. Metcalf, James E. Woolsey, defendant's New York office, defendant's San Francisco office, defendant's Cincinnati office and defendant's South American offices, both prior and subsequent to May 23, 1946.

What papers have you produced here in answer to that subpoena?

A. All of the papers called for by the subpoena are here in the possession of Mr. Pickett.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. Will you produce them?

Mr. Pickett: I have already produced a number of those papers. In addition, I have various other papers. They are here.

(Discussion off the record.)

(Whereupon, at 1 o'clock p.m., an adjournment was taken to 2:15 o'clock p.m.)

Afternoon Session

Mr. Pickett: Mr. Mesirov, will you state when you claim that the negotiations for the purchase and disposition of the glucose involved in this suit terminated?

Mr. Mesirov: As far as my understanding goes, it [573] terminated on September 20, 1946, by a letter marked Plaintiff's Exhibit 44-N.

Mr. Pickett: I will say that I do not agree and do not concede that any such negotiations continued until that date, but I will be guided by your statement in undertaking to produce the documents which fall within the subpoena as you so interpret it.

Mr. Mesirov: I would say the 20th, the date of that letter. If, however, you know of any subsequent communications showing continuous negotiation, then I shall ask you to produce that.

Mr. Pickett: And I will state that I know of no such documents. Indeed, my position is that those

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

negotiations had terminated long prior to the date you give.

(Discussion off the record.)

Mr. Pickett: I have certain documents, Mr. Mesirov, to and from Mr. Woolsey, which may relate to the negotiations referred to in the subpoena. These documents requested and conveyed certain legal advice. For that reason, I deem that they are privileged, and while we have produced the documents, I am not tendering them to you for inspection.

Mr. Mesirov: As the witness is not here, I will address my questions to you.

Will you give us the date of these communications, and the parties between whom they were exchanged? You gave us [574] only one of the parties.

Mr. Pickett: Yes, sir. There are three documents. The first is dated May 15, 1946; the second is dated May 17, 1946, and the third is dated May 20, 1946, and the communications are between Mr. Woolsey and Mr. R. H. Baglin.

Mr. Mesirov: All right. You claim they are privileged?

Mr. Pickett: Yes, sir.

Mr. Mesirov: And you refuse to exhibit them or have them marked for identification?

Mr. Pickett: Yes, unless we are directed by the Court to exhibit them. We stand on our claim of privilege.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

I next have an undated handwritten memorandum which is headed C. B. and signed D. E. If you wish me to state what my information is as to what this document is, I will state for the record. I am advised that this is a handwritten memorandum from Mr. Carl Kiefer to his assistants in the Cincinnati office, Mr. Balzer and Mr. Eberts.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov. Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 47-N for Identification.)

Mr. Pickett: I have a memorandum from Mr. Milton B. Seasonwein, dated May 28, 1946, addressed to Mr. Woolsey in [575] San Francisco. Mr. Seasonwein, as this memorandum shows, is in the law department in the New York office. If you will accept my statement, Mr. Seasonwein is a lawyer.

Mr. Mesirov: I take your word for it.

Mr. Pickett: We regard this memorandum as privileged, also, and for that reason I will not disclose it for your inspection.

I also have a memorandum from Mr. Woolsey to Mr. Seasonwein, dated June 3, 1946, in response to the document which I just mentioned, which I also deem privileged, and for that reason will not produce for your inspection.

I also have a document dated June 4, 1946, being

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

a communication from Mr. Woolsey to Mr. Baglin—Mr. R. H. Baglin—which I deem privileged, and for that reason will not produce for your inspection.

Mr. Mesirov: All right, sir.

Mr. Pickett: Next I have a memorandum from Mr. G. E. Baglin to Mr. Woolsey, dated June 5, 1946. I am informed that Mr. G. E. Baglin is a lawyer who is a subordinate of Mr. Woolsey. We deem this document privileged, and for that reason will not produce it for your inspection.

I may say that Mr. G. E. Baglin is not the same person as Mr. R. H. Baglin.

Mr. Mesirov: There is a date there, isn't there?

Mr. Pickett: Yes. [576]

Next I have a typewritten sheet of paper dated June 24, 1946, which is headed "Statement for Dichter." It bears no signature and there is no name at the bottom, but for the purposes of identification, I will state that I am informed that this was prepared by Mr. Metcalf. We are producing that for your inspection.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Pickett: I will state again producing this and various other papers, I am in no way conceding that there were any negotiations for the purchase or disposition of the glucose involved in this suit at this particular time, but since you have already stated to me your understanding of what the subpoena covers, I am making the production now so

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

that we do not have to go to the trouble of getting a new subpoena if there is any question about that matter.

Mr. Mesirov: Mark that.

(The above described document was there-upon marked Plaintiff's Exhibit 48-N for Identification.)

Mr. Pickett: Next I produce the original of the cablegram addressed to C. W. Metcalf, Schenley, dated June 30, 1946, signed Dichter.

(The above described document was there-upon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that. [577]

(The above described document was there-upon marked Plaintiff's Exhibit 49-N for Identification.)

Mr. Pickett: Next is a copy of what evidently was a cable to Mr. Dichter signed C. W. Metcalf and dated 7-2-46.

(The above described document was there-upon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was there-upon marked Plaintiff's Exhibit 50-N for Identification.)

Mr. Pickett: Next I produce a carbon copy of what evidently was a cable to Mr. Dichter signed Metcalf, dated 7-3-46.

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 51-N for Identification.)

Mr. Pickett: Next I produce the original of the cable addressed to Metcalf, Schenley, signed Dichter. The date is the 9th of July, 1946.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 52-N for Identification.) [578]

Mr. Pickett: I now produce a carbon copy of a cablegram to Mr. Dichter signed Schenley, Metcalf, dated July 10, 1946.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 53-N for Identification.)

Mr. Pickett: Next I produce what purports to be a copy made of a cablegram addressed to Metcalf, Schenley, signed Dichter, bearing the notation received July 26, presumably 1946, from Rio

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

de Janeiro. This is not the original document or an office copy. It appears to be a copy made from an original document.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 54-N for Identification.)

Mr. Pickett: Next I have a memorandum headed, "Memorandum for the file," bearing Mr. Heymsfeld's name at the bottom, and dated June 6, 1946. This document relates to certain legal advice which Mr. Heymsfeld had given and for that reason I claim that it is privileged and I am not submitting it to you for your inspection. [579]

Mr. Mesirov: Does that memorandum show to whom it was furnished?

Mr. Pickett: The memorandum does not indicate it was furnished to anybody. It is headed, "Memorandum for the file."

Next I have a memorandum dated June 10, 1946, bearing Mr. Heymsfeld's name at the bottom. It is not addressed to anybody, and I gather that it is another memorandum for the file. This memorandum I also deem to be privileged and for that reason I am not submitting it for your inspection.

Next I have a memorandum to Mr. Heymsfeld from Mr. Metcalf, dated June 24, 1946, which I

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

deem to be privileged and for that reason I am not submitting it for your inspection.

Next I have a memorandum to Mr. Metcalf from Mr. Heymsfeld, dated June 26, 1946, which I deem to be privileged, and for that reason I am not submitting it for your inspection.

Next I have a memorandum dated 7-3-46. It is addressed by initials only to Mr. Heymsfeld and signed by initials which are those of Mr. Metcalf.

(The above described document was handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon [580] marked Plaintiff's Exhibit 55-N for Identification.)

Mr. Pickett: Next I have a memorandum from Mr. Heymsfeld, dated July 12, 1946, to Mr. Casden. If you will accept my statement, Mr. Mesirov, Mr. Casden is a lawyer in the New York office of Schenley, working under Mr. Heymsfeld's supervision. I deem this memorandum privileged and for that reason I am not submitting it for your inspection.

Mr. Mesirov: I accept your statement with regard to everything except with regard to their being privileged communications.

Mr. Pickett: I don't expect you to concede that.

Mr. Mesirov: And I may say right here that I shall ask you to add all of these papers which you are now declining to produce for my inspection, be-

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

cause they are privileged communications, here on Thursday, October 30, at which time Mr. Heymsfeld is to return for examination, so that I may examine him with relation to these papers.

Mr. Pickett: Surely.

Mr. Mesirov, I have here a letter written to Mr. Heymsfeld by Mr. Hosey. In fact, I have two letters: one is written on the letterhead of Energetic Worsted Corporation and the other Engraw Export and Import Company. Both of those letters are dated August 7, 1946. I do not know whether Mr. Hosey is or is not an officer or agent of the [581] plaintiff.

Mr. Mesirov: You have noticed that that is not the plaintiff. I really do not recall, and I have not papers here from which I could answer that question. If it is necessary, I can call up and get the minutes.

Mr. Pickett: It is not necessary. I am offering to produce them for your inspection if they come within the subpoena.

Mr. Mesirov: If they do not, it does not matter and I do not think there is much relevancy either. Mark them.

(The above described documents were thereupon marked Plaintiff's Exhibits 56-N and 57-N for Identification.)

Mr. Pickett: I now produce a memorandum dated August 27, 1946, headed "Memorandum for

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

the file," bearing Mr. Heymsfeld's initials at the bottom. This memorandum consists of two pages.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 58-N for Identification.)

Mr. Pickett: Next I have a memorandum dated September 5, 1946 headed, "Memorandum for the file," bearing Mr. Heymsfeld's initials. This memorandum is three pages. [582]

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 59-N for Identification.)

Mr. Pickett: Next I produce the original of a letter dated September 10, 1946, addressed to Mr. Heymsfeld on the letterhead of Energetic Worsted Company signed J. L. McManus.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was there-

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

upon marked Plaintiff's Exhibit 60-N for Identification.)

Mr. Pickett: I now produce a carbon copy of a letter to Mr. McManus dated September 11, 1946, signed by Mr. Heymsfeld.

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark that.

(The above described document was thereupon marked Plaintiff's Exhibit 61-N for Identification.)

Mr. Pickett: I now produce a memorandum dated September 17, 1946, headed "Memorandum for the files," bearing Mr. Heymsfeld's initials. That is the answer. [583]

(The above described document was thereupon handed to Mr. Mesirov.)

Mr. Mesirov: Mark it.

(The above described document was thereupon marked Plaintiff's Exhibit 62-N for Identification.)

Mr. Pickett: Mr. Mesirov, will you stipulate that both parties may substitute photostatic copies for any exhibits produced by either side during the depositions of Mr. Metcalf, Mr. Dichter and Mr. Heymsfeld.

These photostatic copies will be marked to conform to the original exhibits. A set of these photo-

EXHIBIT R—(Continued)

(Deposition of Ralph T. Heymsfeld.)

static copies to be attached to the original deposition and may be used for all purposes in place of the original documents?

Mr. Mesirov: Yes.

Mr. Pickett: It is hereby stipulated the examination is adjourned to Thursday, October 30, 1947, at 10:15 o'clock a.m., at the office of Schenley Distillers Corporation, 37th Floor, 350 Fifth Avenue, New York.

(Adjourned to Thursday, October 30, 1947,
at 10:15 o'clock a.m.)

DEFENDANT'S EXHIBIT No. R-1

In the District Court of the United States for the
Southern District of New York

File No. M-8-85

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
Corporation,

Defendant.

SUBPOENA DUCES TECUM

To: Emanuel R. Dichter, residing at 150 Bennett
Avenue (also known as 150 Bennett Street)
Manhattan Borough, New York City:

(1780 Broadway N Y C) (in pencil)

Charles W. Metcalf, residing at 330 Park Avenue,
Manhattan Borough, New York City;

Ralph T. Heymsfeld, individually and as attorney for Schenley Distillers Corporation, place of business at 350 Fifth Avenue, Manhattan Borough, New York City:

You and Each of You Are Commanded to appear before James B. Kilsheimer, Jr., a Notary Public, duly commissioned and sworn and duly authorized to administer oaths under the laws of the State of New York, at his office located at 10 East 40th

Defendant's Exhibit No. R-1—(Continued)

Street, in the City, County and State of New York, on the 8th day of October 1947 at 10:30 o'clock in the forenoon and to take your several depositions upon oral examination.

And said Emanuel R. Dichter; Charles W. Metcalf and Ralph T. Heymsfeld are to bring with them and produce at the time and place aforesaid all written, and memoranda of oral, instructions, telephone calls, and reports, and all correspondence, memoranda, telegrams and cables relating to the negotiations for the purchase and disposition of the glucose involved in this suit, which passed between and among the defendant corporation, its affiliates, its subsidiaries, its and their officers, agents and employees, the plaintiff, plaintiff's officers and agents, G. Fred Berger, Harold A. Whipple, Harold A. Whipple Company, Joseph B. Donnelly, Robert H. Baglin, Ralph Heymsfeld, Emanuel R. Dichter, Charles W. Metcalf, James W. Woolsey, defendant's New York office, defendant's San Francisco office, defendant's Cincinnati office and defendant's South American offices, both prior and subsequent to May 23, 1946, and then and there to testify on behalf of the Plaintiff in the above-entitled action pending in said United States District Court of the United States for the Southern District of California wherein Compania Engraw Comercial E Industrial S.A., is Plaintiff, and Schenley Distillers Corporation (a corporation) is Defendant. [586]

Witness, the Honorable Alfred C. Coxe, District

Defendant's Exhibit No. R-1—(Continued)
Judge of the United States, for the Southern District of New York, this 30th day of September, 1947.

/s/ WILLIAM V. CONNELL,
Clerk.

(In handwriting:)
So Ordered 9/30/47

/s/ ALFRED C. COXE,
U.S.D.J.

STANTON & STANTON,
Attorneys for Plaintiff, 740 South Broadway, Suite
1004-09, Los Angeles 14, California. [587]

District Court of the United States, Southern
District of New York

COMPANIA ENGRAW COMERCIAL E INDUSTRIAL S.A. a Corporation,
Plaintiff,
against

SCHENLEY DISTILLERS CORPORATION, a
Corporation,
Defendant.

SUMMONS AND COMPLAINT AFFIDAVIT
OF SERVICE (CORPORATION)

State of New York,
County of New York

Vincent Kunigenas, being duly sworn, deposes

Defendant's Exhibit No. R-1—(Continued)

and says: that on the 2nd day of October, 1947, at No. 350 Fifth Avenue, Borough of Manhattan, City of New York, he served the within Subpoena Duces Tecum upon Schenley Distillers Corporation, a domestic corporation, the defendant therein named, by delivering to and leaving a true copy thereof personally with Ralph T. Heymsfeld, an officer of said corporation, to wit, its attorney.

Deponent further states that he knew the corporation so served as aforesaid to be the same corporation mentioned and described in the saie Subpoena Duces Tecum as the defendant therein, and knew the said Ralph T. Heymsfeld to be such officer at that time.

Deponent is over the age of 21 years and not a party to the action.

/s/ VINCENT KUNIGENAS.

Sworn to before me, this 3rd day of October, 1947.

JOSEPH GILLMAN,

Commissioner of Deeds,

N. Y. Co. Clk's No. 130.

Commission Expires December 17, 1948.

Defendant's Exhibit No. R-1—(Continued)
District Court of the United States, Southern
District of New York

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL S. A., a Corporation,
Plaintiff,
against

SCHENLEY DISTILLERS CORPORATION, a
Corporation,
Defendant.

AFFIDAVIT OF SERVICE AND AFFIDAVIT
OF INVESTIGATION UNDER SOLDIERS'
AND SAILORS' CIVIL RELIEF ACT

State of New York,
County of New York—ss.

Harry White, being duly sworn, deposes and says:

I reside at NYC; that on the 6th day of Oct., 1947, at No. 1780 Broadway, Borough of Manhattan, City of New York, I served the within subpoena upon Charles W. Metcalf, the witness in this action, by delivering to and leaving a true copy of said subpoena with said witness personally. I further state that I knew the person so served as aforesaid to be the same person mentioned and described in the said subpoena as the witness in this action. Deponent gave to witness a fee of 50c.

I am over the age of 21 years and not a party to the action.

Defendant's Exhibit No. R-1—(Continued)

That the said defendant is not in the Military Service of any country allied with this nation in the conduct of the present war, nor has the said defendant received notice of induction into the armed forces of the United States.

/s/ HARRY WHITE.

Sworn to before me this 7th day of October, 1947.

JOSEPH GILLMAN,

Commissioner of Deeds,

N. Y. Co. Clk's No. 130.

Commission Expires December 17, 1948.

District Court of the United States, Southern
District of New York

COMPANIA ENGRAW COMMERCIAL E IN-
DUSTRIAL S.A., a Corporation,

Plaintiff,

against

SCHENLEY DISTILLERS CORPORATION, a
Corporation,

Defendant.

AFFIDAVIT OF SERVICE AND AFFIDAVIT
OF INVESTIGATION UNDER SOLDIERS'
AND SAILORS' CIVIL RELIEF ACT

State of New York,
County of New York—ss.

Vincent Kunigenas, being duly sworn, deposes

Defendant's Exhibit No. R-1—(Continued)
and says: I reside at New York City; that on the 2nd day of October, 1947, at No. 350 Fifth Avenue, Borough of Manhattan, City of New York, I served the within Subpoena Duces Tecum upon Ralph T. Heymsfeld, the defendant in this action, by delivering to and leaving a true copy of said Subpoena Duces Tecum with said defendant personally. I further state that I knew the person so served as aforesaid to be the same person mentioned and described in the said Subpoena Duces Tecum as the defendant in this action.

Deponent gave defendant a fee of \$1.00.

I am over the age of 21 years and not a party to the action.

I asked him whether he was in the service of the United States Government in any capacity whatever. He told me he was not. He was clad in ordinary civilian clothes and wore no uniform of any kind. Upon information and believe I aver that the defendant is not in the military service of the United States at the present time as that terms is used in the Act of Congress known as "The Soldiers and Sailors Civil Relief Act." The sources of my information and grounds of my belief are the conversations above narrated.

That the said defendant is not in the Military Service of any country allied with this nation in the conduct of the present war, nor has the said

Defendant's Exhibit No. R-1—(Continued)
defendant received notice of induction into the
armed forces of the United States.

/s/ VINCENT KUNIGENAS.

Sworn to before me this 3rd day of October,
1947.

JOSEPH GILLMAN,
Commissioner of Deeds,
N. Y. Co. Clk's No. 130.

Commission expires December 17, 1948.

Western Union
Buenos Aires, July 8, 1946.

NLT
C W Metcalf
Schenley Distillers
New York N Y

Cancellation here would cost approximately forty-five thousand Dollars stop However opening of letter credit would at once eliminate penalty to extent of thirty thousand Dollars and would provide necessary time for orderly liquidation over contract period which is for balance 1946 stop Also sale over such extended period should further reduce probable loss if any to nominal amount therefore we suggest we act as your agents to liquidate contracts using our judgment as to manner of liquidation having in mind reduction of loss to minimum or entirely stop If agreed please advise so we can inform contractors and open lettercredit thru Firstboston these

Defendant's Exhibit No. R-1—(Continued)
calculations dont cover Whipl will you deal with
him directly.

ENGRAW DICHTER BERGER

Western Union

July 18, 1946.

NLT

MOMSEN

New York

608 Reschenley replying your todays cable first
twenty per cent letter credit represents eightyfive
thousand dollars approximately required by suppli-
ers as one contract condition second should Schenley
prefer flatly perform contract on terms originally
agreed with Engraw and Losangeles agent obviously
the items covering the latters compensation would
be eliminated however the proposal contained in
Engraw Dichter cable July eighth is different for
it consists in Schenley authorizing Engraw liqui-
date glucose contracts at best possible price to re-
duce or eliminate Schnley loss hence logical En-
graw and Losangeles agent expect reasonable com-
pensation third because there is no assurance mar-
ket prices shall remain as they are today during
next six months namely for time stipulated for pro-
ducing and delivering glucose under the contract
stop moreover there is always possibility Argentine
government withholds exportation permits glucose
fourth we have Metcalfs approval for representing
Schenley in premises moreover we are lawyers for

Defendant's Exhibit No. R-1—(Continued)

Schenley in other matters stop in this particular case intervening as mediators in endeavour effect fair amicable settlement telephoning tomorrow noon.

GOYTIA.

ingles

Victor Daniel Goytia

Avda R.S. Pena 501

Western Union

NLT

New York

609 pending Monday telephone conversation note following one advise should you or we attempt bring Whipple in proposed settlement two does Schenley wish us work here on theory liquidating glucose their account according Dichter Engraw cable Metcalf July eighth and Engraws Metcalf July twelfth or would they be inclined we work on basis cancellation contract.

GOYTIA.

Ingles

Victor Daniel Goytia

Av. R.S. Pena 501

Registro de Exp 8597-P. Cargar cuenta Estudio
Dres. Goytia.

Western Union

Julio 22 de 1946.

NLT

MOMSEN

New York

610 cannot withhold longer glucose suppliers

Defendant's Exhibit No. R-1—(Continued)
therefore indispensable you procure authorization
liquidate or else cancel contract stop Dichter En-
graw judge liquidation preferable we also recom-
mend stop Engraw received today Whipples author-
ization act his agent hence our opinion good chance
settling matter providing clients select either method
aforementioned cable reply.

GOYTIA.

Victor Daniel Goytia

Av. R.S. Pena 501

Reg. de Exp 85970P Cargar cuenta Estudio Dres.
Goytia.

Compania Englaw

Comercial E Industrial S.A.

San Martin 329

Buenos Aires (Argentina)

U. T. 31—8311

T. T. 387

Inter-Office Communication

Buenos Aires, August 2nd, 1946.

From Mr. G. Fred Berger

To Mr. E. R. Dichter.

Subject: Glucose Contracts

After numerous cables during April and May
covering the subject of the sale of glucose thru
Mr. Whipple in Los Angeles, we finally received a
telegram under date of May 20th accepting for par-
ties then unknown to us, an offer for 1300 tons
which we had made on April 24th and May 9th.

Defendant's Exhibit No. R-1—(Continued)

We immediately replied advising Whipple that it was impossible to hold offers firm in a market for glucose such as this has been.

On May 21st, we advised Whipple by L. C. that we had available, subject to prior sale, 600 tons at Arg. Pesos \$1.30 per kilo and outlined conditions of payment which included 25% deposit in cash and advised him also that we would endeavor to secure an additional amount up to the 1300 tons if he confirmed the price offered in this telegram, i.e. A.P. \$1.30.

On the 22nd of May, we received a telegram from Mr. Whipple, accepting the 600 tons at \$1.30 and offering to accept the balance of the 1300 tons at the same price. In this cable he also advised us that Schenley was the purchaser and would open credit for the entire amount but without a cash deposit which had been requested in our telegram of May 21st, according to the requirement of the supplier.

Under the circumstances and knowing that Schenley was the purchaser, we took the steps necessary to obtain as much of the balance at the same price as possible (our price being \$1.20 F.A.S. and our offer thru Whipple being at \$1.30 F.O.B. so that we had a F.A.S. F.O.B. cost of approximately five centavos, leaving a net to us of five centavos on our F.O.B. offer of \$1.30, subject of course, to special storage charges if deliveries did not coincide with steamer availability) and the suppliers now knowing Schenley as the purchaser

Defendant's Exhibit No. R-1—(Continued)
dropped the requirement for a cash deposit requiring only the normal opening of the letter of credit.

Under date of May 22nd, we sent an N.L.T. advising Mr. Whipple that we had made the necessary arrangements for 1135 tons to be shipped as follows:

June, 50 tons; July, 60 tons; August-September, 200 tons; September, 150 tons; October, 275 tons; November, 200 tons; December, 200 tons.

Contracts to cover this were signed as follows:

600 tons, May 23rd; 60 tons, May 22nd; 200 tons, May 23rd; 75 tons, May 24th; 150 tons, May 22nd; 50 tons, May 27th. [597]

Under date of May 23rd, 1946, your Mr. J. B. Donnelly at your San Francisco office, wrote to Whipple starting his letter "this letter will confirm our telephone conversation and your letter of May 21st" the acceptance being the original 600 tons mentioned earlier in this letter. However, as a P.S. to this letter, Mr. Donnelly added "since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows"; this shipping schedule is the same as we outlined in our telegram of May 22nd so that undoubtedly the body of his letter was dictated some time earlier than the P.S. tho the entire letter was dated May 23rd.

I have mentioned these dates for the simple reason that apparently there seems to be some doubt

Defendant's Exhibit No. R-1—(Continued)

expressed as to the order in which these contracts were made. We closed them after receiving Whipple's instructions that the sale had been made to Schenley and our advice to Mr. Whipple under date of May 22nd, via N.L.T. so stated, "acting on your cable 21st, have completed firm purchases for account Schenley Distilleries 1135 tons stop" and then we added the shipping schedule which Mr. Whipple must have received under date of May 23rd.

Mr. Donnelly confirms the acceptance of this offer, his letter being dated May 23rd but please note that Mr. Donnelly's letter of May 23rd confirms a telephone conversation and also Mr. Whipple's letter of May 21st. Mr. Whipple wired us on the 21st, via night letter, which we received the morning of the 22nd, advising us of the approval of the purchase of the entire amount up to 1300 tons and that Schenley would open their credit for the entire amount.

Accordingly, the question of the timing and dating of contracts appears to be one of whether or not there is good faith all around.

It is obvious that we acted in the completion of these contracts only on the strength of our dependence on the fact that this purchase was being made for Schenley of whose credit I am fully familiar as a former banker.

Without attempting to enter into a controversy it would seem that if the present opinion is that we purchased without authority from Schenley, then

Defendant's Exhibit No. R-1—(Continued)

it seems only fair to point out that in Mr. Donnelly's letter to Mr. Whipple, he in turn, in his P.S., acknowledged and accepted "the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows" that shipping schedule having been sent by us to Whipple in our N.L.T. of May 22nd so that obviously there was an offer and an acceptance if there was no purchase for account of Schenley.

Under date of June 4th, we received the first telegram from Whipple advising us that apparently something had gone amiss with the contracts, the objection at that time seeming to be based on a required analysis of the glucose.

We immediately advised Whipple of the analysis of the purchase we had made and also advised that our purchase had been made within the requirement of 43-45 Baume U.S.P.

Then, on the 5th of June, I wired Schenley at Cincinnati (Mr. Whipple's wire noted Cincinnati headquarters were refusing to authorize the credit) quoting to them the purchases we have made and the analysis of the test of the spot purchase we had already made in order to be certain to cover their requirements advising them at the same time that each delivery would be subject to a similar test for their protection.

Under date of June 6th, Mr. Whipple advised us that he had obtained a part of an earlier sample we had sent him and forwarded this to the Schenley laboratory in Chicago.

Defendant's Exhibit No. R-1—(Continued)

Under date of June 8th, I sent a second wire to Cincinnati asking for a reply and under date of June 12th, we received an N.L.T. from Mr. Metcalf regretting the confused situation which had developed and suggesting that we advise him at New York of the extent of the uncancellable commitments.

After the exchange of various other telegrams under date of June 14th, I wired Schenley of New York that in order [600] to eliminate further confusion, we were cabling Whipple the extent of uncancellable commitments and the amount of liquidation damages, having ascertained at this time that we could cancel the largest contract for a ten centavos per kilo payment.

Mr. Dichter then reached Buenos Aires and made contact with us and as a result, we sent a joint cable to Mr. Metcalf under date of July 8th, outlining in effect that it would cost approximately U\$S 45.000.— to cancel but that if a letter of credit was opened (a 20% requirement of the total was later arranged) the cancellation penalty of U\$S 30.000.— would be eliminated and this action would also provide the time for orderly liquidation over the contract period which is the balance of 1946.

We also expressed our belief that there need be no loss in connection with the balance of the contract for it we act as the agent for Schenley to liquidate the contracts, we believe that unless something untoward and drastic were to happen, we

Defendant's Exhibit No. R-1—(Continued)
should be able to liquidate the contracts without loss to any one.

We also took up the matter by cable with Mr. Whipple in order to ascertain the minimum amount of commission for which he would settle and he has left the matter in our hands.

Later telephone conversations with Mr. Metcalf disclosed that apparently he was satisfied to leave the further decision [601] in connection with liquidation or cancellation in our hands together with Dr. Victor Goytia, the Argentine member of the firm Momsen, Freeman and Goytia.

We discussed this matter with Dr. Goytia who exchanged cables with his New York office but during Mr. Metcalf's absence, apparently the legal department chose to take a stand different than that taken by Mr. Metcalf and the situation then became complicated.

As of the end of July, it became necessary for us to assume that Schenley would wish to liquidate (which liquidation Messrs. Dichter, Goytia and Berger had jointly recommended) and in order not to be in violation of the contracts we had entered into for account of Schenley, we picked up a further 160 tons of glucose so that we now have approximately Arg. Pesos \$250.000.— of our funds involved without requiring any advances up to this time.

But the major contractor is now pushing us for a decision as to whether we are cancelling or liquidating (and he is in a position to do so for there

Defendant's Exhibit No. R-1—(Continued)

has been not deposited the required Schenley credit for 20% of the total contract) and it will be necessary for us to give him an answer shortly.

We personally cannot cancel without violating the contracts into which we entered for account of Schenley, and if we violate them—they having been registered with the Chamber of Commerce,—we might just as well go out of business. [602]

On the other hand, based on our funds already involved in taking up the July commitments (and there are 300 tons available in August) we are not in a position to go forward without a complete agreement with Schenley either to liquidate or to cancel.

To summarize, on the receipt of knowledge that the purchaser of the glucose in question was Schenley, we were able to eliminate the requirement for a cash deposit and were able to complete arrangements for the purchase of 1135 tons on a delivery schedule outlined in our N. L. T. of May 22nd which Mr. Whipple must have relayed to Mr. Donnelly who acknowledged and confirmed Schenley's acceptance of our offer, including in his acknowledgment the schedule of shipments which is the same schedule we outlined in our N. L. T. of the night before.

Therefore, if it were to be a question of whether or not we purchased before Schenley confirmed (and this we did not do until we knew that Schenley was the purchaser) the offsetting question seems to be that the information we outlined in our N. L. T. of

Defendant's Exhibit No. R-1—(Continued)

May 22nd had definitely to be relayed by Mr. Whipple to Mr. Donnelly or he would not have been in a position to acknowledge and confirm the purchases and to further oueline the shipping schedules which were for the first time mentioned in our N. L. T. of May 22nd.

So, it would seem that we either purchased for account of Schenley or Schenley's representative completed an acceptance of our offer—it does not seem possible that both actions can be contended.

Assuming for the sake of this memorandum, that Schenley admits either legal or moral responsibility, then the joint recommendation of Messrs. Goytia, Dichter and the writer is that we liquidate the contracts to eliminate both the cancellation cost and any possible reflection on either Schenley or Engraw for not fulfilling the contract, in addition to which it is our belief that the liquidation can in all probability be arranged without loss to any one.

Messrs. Goytia, Dichter and Berger feel that if an allowance for Whipple were made to the extent of U\$S 5.000.—plus U\$S 500.—cost, this would be entirely satisfactory to Whipple.

To further summarize, the cable which Messrs. Dichter and Berger sent to Mr. Metcalf under date of July 8th and added to it our suggested settlement for Whipple, the summarization would be as follows:

Local cost of cancellation as out-

lined in the telegram.....U\$S 45.000.—

Defendant's Exhibit No. R-1—(Continued)

Whipple's commission and expense allowance “ 5.500.—

Total cost if cancellation is carried out “ 50.000.—

Defendant's Exhibit No. R-1—(Continued)

If the recommended liquidation is carried out immediately, the need for payment of the cancellation fee is eliminated which reduces the cost by.....U\$S 30.000.—

Net cost assuming that the contracts cannot be liquidated at better than 1.20.....U\$S 20.500.—

In view of the fact that the government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 1.23/1.25 but we already have information from our broker of a large offer pending from the United States at 1.31 just as soon as export licenses are granted.

So, if it were not for this delay in the issuance of the export permits, I believe we could continue liquidation if we had nothing more than the 20% letter of credit pledged to meet the contract requirement with the main supplier.

It is estimated that the export licenses should be coming through shortly and under the circumstances we cannot help but feel that the major portion, if not all of the U\$S 20.500.— shown above as the net

Defendant's Exhibit No. R-1—(Continued)

cost of liquidation will disappear as contracts are liquidated between now and the end of the contract period which is December 31, 1946.

Accordingly, we are most hopeful that Mr. Metcalf will agree to the suggested program of liquidation and will therefore arrange to have the letter of credit deposited and authorize us to proceed with the liquidating taking such steps as may be necessary to carry it through successfully in accordance with the program already outlined by Messrs. Goytia, Dichter and Berger.

CIA. ENGRAW COMERCIAL E
INDUSTRIAL S. A.

/s/ G. FRED BERGER,
President.

GFB:MBF

Mr. Bronson: Does your Honor wish me to step down in case counsel has any objection to any of the questions or answers in that deposition?

The Court: You may indicate them now. You are not going to read them.

Mr. L. B. Stanton: I am not prepared at this time to make objections on them.

The Court: You will have to. I am sorry. I can't have one rule for them and another for the other side. You stated you insisted that they have the depositions. It works both ways. You yourself said that they had plenty of time. I am not going to stop now. You did not want me to stop for them. I would not have stopped, anyway.

Mr. L. B. Stanton: All right, your Honor.

The Court: If you do not make them now they are waived.

Mr. L. B. Stanton: All right; we will waive them.

The Court: All right.

Mr. Bronson: I next offer the deposition of Charles W. Metcalf in evidence. That offer is made, if your Honor please, without prejudice to our objection originally made to evidence dealing with activities of any of these parties after June 7th, the date of notice from Schenley to Whipple that they were not going to go through with the transaction. It is to meet, in other words, evidence that was adduced after your Honor's ruling.

The Court: There is no waiver under our rules of an objection merely because you join issue with it and after the court has overruled you, you offer contradictory testimony. That is never done.

Mr. Bronson: I mean the stipulation, then.

The Court: That is all right. When we were governed by the conformative statute some very bad rules developed such as the effect of both joining in a motion for a directed verdict or a motion for a nonsuit and the failure to present findings, et cetera. They were all brushed aside by the New Rules, so now you can make any motion, whether it is consistent with your position or not. You can make any motion you want addressed to any portion of the plaintiff's testimony or to the whole case, and after you have been overruled you can proceed to defend the case without anybody pulling against you

the proposition that you should have rested on your objection.

I do not know how those old-fashioned ideas crept into Federal procedure, but since 1938 they have all swept aside.

Mr. Bronson: I am not growing up as fast as your Honor apparently.

The Court: Ordinarily, you know, procedure has been my hobby. I probably have written more than anybody on the Pacific Coast who is not a professional writer on the subject of California procedure and, since the New Rules have been enacted, on the Federal Procedure. I have lived with it. I taught it for 10 years in Loyola Law School here. So I probably keep track of the vagaries of our procedure more than anyone whose interest is that of a student. Off the record:

(Brief comment off the record.)

All right; you can offer all the evidence with the understanding that you are not waiving any of the points as to which the evidence is directed. You are merely protecting yourself by offering your side of the transaction.

Mr. Bronson: Very well, your Honor.

The Court: So that the court, in case it finds that my ruling was incorrect, would have your version, too.

The Clerk: The deposition of Charles W. Metcalf is marked Defendant's Exhibit S in evidence.

(Defendant's Exhibit S reads in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT S

In the District Court of the United States for the
Southern District of California

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S. A., a corporation

Plaintiff

vs.

SCHENLEY DISTILLERS CORPORATION,

a corporation

Defendant

Depositions of Charles W. Metcalf and Emanuel R. Dichter, called in behalf of the Plaintiff pursuant to Notice under Rule 30 taken before James B. Kilsheimer, Jr., a Notary Public, at his office, No. 10 East 40th Street, City, County and State of New York, on Wednesday, October 8, 1947, at 10:30 o'clock in the forenoon pursuant to Notice to be filed under Rule 30.

Appearances:

STANTON & STANTON, ESQS.

740 South Broadway

Suite 1004-09

Los Angeles 14, California

Attorneys for Plaintiff

By: HARRY S. MESIROV, ESQ.,

of Counsel

Plaintiff's Exhibit S—(Continued)
BRONSON, BRONSON & McKINNON,
ESQS.

1500 Mills Tower,
220 Bush Street,
San Francisco 4, Calif.

Attorneys for Defendant [610]

By: CHARLES PICKETT, ESQ.
CHADBOURNE, WALLACE, PARKE
& WHITESIDE, ESQS.,
of Counsel.

CHARLES W. METCALF,

Witness

EMANUEL R. DICHTER,

Witness

It Is Stipulated by and between plaintiff and defendant, by the counsel herein appearing, that the original depositions of the witness being examined may remain in the hands of James B. Kilsheimer, Jr., Esq., a Notary, at his office at 10 East 40th Street, New York City, for review and signature by the witnesses and for completion of their notary certificate, and that if the said depositions, together with such corrections as the witness may desire to make, are not signed by the time of trial, it may be used by either side with the same force and effect as though they had been signed, and all formalities complied with.

It Is Further Stipulated that in case a witness refuses to answer a question, it shall not be neces-

Plaintiff's Exhibit S—(Continued)

sary for the Notary to repeat such question and to obtain the witness's refusal to answer.

Mr. Mesirov: I want to offer in evidence a notice of Proof of Service as Plaintiff's Exhibit IN.

(Paper referred to received and marked.

"Plaintiff's Exhibit 1N in Evidence, October 8, 1947.) [611]

CHARLES W. METCALF,

residing at 330 Park Avenue, New York, N. Y., called in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Mesirov:

Q. Mr. Metcalf, will you give us your full name?

A. Charles W. Metcalf.

Q. Where do you reside?

A. 330 Park Avenue, New York City.

Q. And have you a business address?

A. Yes, 1780 Broadway.

Q. What is your occupation now?

A. I am a business consultant.

Q. You are not now employed by Schenley Distillers Corporation? A. I am not.

Mr. Mesirov: For the sake of brevity, I am going to refer to the plaintiff as "Engraw," you know who they are, and the defendant as "Schenley," if you don't mind.

Mr. Pickett: All right.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. (By Mr. Mesirov): Were you ever employed with Schenley?

A. As a consultant, yes, sir.

Q. During what period?

A. Roughly, for fifteen months from October 15, 1945.

Q. Fifteen months from October, 1945, which would carry you into when? [612]

A. 1947, I believe. I guess it was longer. I think it was longer than fifteen months. It was probably near October to October—near sixteen to seventeen months.

Q. And what were your duties as consultant? It was a full time position, was it not?

A. Yes, sir.

Q. What were your duties?

A. Well, I was assigned to study purchasing procedure, and purchasing operations, and such other things as Mr. Rosensteel and his organization asked me to do.

Q. Are you familiar with the transactions involving negotiations for the purchase of Glucose by Schenley from Engraw through Mr. Whipple?

A. I did not participate in those negotiations, and what I know about them I got from the people that did and from correspondence.

Q. When did you first learn about this purchase?

Mr. Pickett: I am going to object to the form of the question, Mr. Mesirov, insofar as it relates

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

to this purchase as it is the position of the defendant that there was no purchase. May I suggest that you reword the question to say alleged purchase or something of that sort?

Mr. Mesirov: I don't like the word "alleged" either. I am not trying to indirectly get a statement from this witness that it was a purchase. I will rephrase the question. Please read the question. [613]

(Last question read back.)

Q. (By Mr. Mesirov:) When, and from whom, did you first learn about the negotiations which culminated in a letter signed by Mr. Donnelly on behalf of the Schenley Corporation?

Mr. Pickett: I am going to object to that question, also, Mr. Mesirov, because of the conclusion in the words 'culminated in a letter signed by Mr. Donnelly on behalf of the Schenley Corporation.' I believe the easiest way to handle it would be to refer to the letter which is an exhibit to the Complaint, as I understand it, with which, I presume, the witness must have become familiar.

Q. (By Mr. Mesirov): When did you first, and from whom, did you learn about the transaction involving the Glucose which is the subject of this suit?

A. I first learned about this matter from the General Traffic Manager of the Schenley Corporation, Mr. Gusky, who asked me if a purchase had

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

been made, and if he was to arrange for the steamship space—shipping space.

Q. What was your reply to that?

A. I didn't know anything about it; that I would try and find out.

Q. Did you speak to anyone in the Schenley organization with reference to that inquiry? [614]

A. Yes, quite naturally.

Q. To whom? A. I can't recall——

Q. And what did you say?

A. (Cont'd) ——whether I asked Mr. Keefer, who was on the coast at the time, or someone in the Purchasing Department in Cincinnati.

Q. What was Mr. Keefer's position in the corporation?

A. He was the vice president of Schenley in charge of production and the purchasing responsibilities for the corporation headed up to him.

Q. Can you give us the substance of your conversation with Mr. Keefer?

Mr. Pickett: I don't want to suggest anything, but I thought that the testimony was that he does not recall whether he had spoken to Mr. Keefer or someone else. Was that what you said?

Mr. Mesirov: That's right.

The Witness: If you asked me who it was I first spoke to, I can't answer the question because I don't remember.

Q. (By Mr. Mesirov): Did you ever speak to Mr. Keefer? A. Oh, yes. [615]

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Will you give us the substance of your conversation with Mr. Keefer relating to this transaction?

A. To the best of my knowledge, when I asked—when I did talk to Mr. Keefer about it, he told me that these brokers on the coast had offered Glucose to Schenley through Donnelly and that a quantity had been arranged for subject, of course, to certain conditions such as the specifications and the letter of credit, and so forth.

Q. What did you next do with respect to it?

A. Well, naturally, I tried to develop whether there was a real need for this merchandise or not since it was of an extremely high price.

Q. And what did you do next after the so-called development?

A. Well, of course, you know I had no authority; I was a consultant. My advice was not to conclude the purchase.

Q. What led you to assume that there was no purchase?

A. Well, the letter of credit had not been opened, and to the best of my memory, the specifications hadn't been approved.

Q. What was your next contact with reference to this transaction and with whom?

A. Will you repeat that question? [616]

Q. What was your next contact with reference to this transaction, meaning this Glucose, the sub-

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

ject of this suit, and with whom was that contact made?

A. Well, I continued to discuss this matter back and forth with Kever.

Q. Leading to what?

A. Leading to the fact that the merchandise—it was questionable whether the merchandise was actually needed or not, and to continue to advise not to conclude the purchase.

Q. What was your advice to him?

A. That's right.

Q. And, by the way, when was it that you were first asked about this Glucose?

A. That was your question number one?

Q. Yes. A. Which I answered.

Q. Did you give me the date?

A. No, I can't. I wouldn't attempt to.

Q. Have you any dates in your mind as to——

A. (Interposing) Not a single date.

Q. (Cont'g) ——any of these conferences or communications? A. No, sir, I would not.

Q. Have you anything in writing bearing on the [617] subject?

A. Personally, no, because I left all my files with Schenley when I terminated my——

Q. And, personally, you have no memorandum of any sort with reference to your activities or your actions in this matter? A. That is true.

Q. Mr. Metcalf, did you ever see a copy of the letter dated May 23, 1946, addressed to Harold A.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Whipple Company and signed 'Schenley Distillers Corporation, J. B. Donnelly,' in which Mr. Donnelly first acknowledged an offer of Engraw and then added a postscript in which he acknowledged and accepted the offer of Engraw for eleven hundred and thirty-five tons of Glucose?

Mr. Pickett: I am going to object to the form of the question solely insofar as it purports to state the effect of the letter. I have no objection, sir, if you show him a copy.

Mr. Mesirov: I am not asking the effect; I am quoting it. Did you read it?

Mr. Pickett: I have seen the letter. I have no objection to your asking him if he ever saw a copy of the letter.

Mr. Mesirov: Well, I am merely discussing the latter. [618]

Q. (By Mr. Mesirov): Will you answer that question? (Handing paper to witness.)

A. I have seen a copy of that letter. I would like to read it again, it has been several months. (Reading) There is something in this letter here—yes, I have seen this letter. I had seen a copy of it.

Q. Did you see that copy of the letter before you concluded, as you said, or before you told him that the purchase had not been completed?

A. No, I didn't see the letter until some time after the first conversations regarding this had taken place. Mr. Donnelly is on the Pacific coast.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. And did anybody tell you that the purchase had not been completed? A. Had what?

Q. That the purchase had not been completed?

A. Well, you see—no, they did not. I mean, having had a great deal of experience in purchasing matters, the purchase had not been completed until, in my judgment, until all of the conditions have been met, and the letter of credit and the specifications had not been decided upon.

Q. But isn't it a fact that the specifications are stated in this letter? (Handing to witness.) [619]

Mr. Pickett: I am going to object to any question which would ask this witness to characterize what the letter does or does not state. The letter speaks for itself, sir.

Q. (By Mr. Mesirov): After your advice, as you say, which you gave to Mr. whom? Mr. Keefer?

A. Mr. Keefer.

Q. —not to go on with this purchase, did you do anything further in the matter?

A. Well, you got to be more specific. I can't answer a question as broad as that.

Q. Did you have any conversations with Whipple or any representatives of Engraw on the subject?

A. I discussed the matter with Mr. Heymsfeld, and I also discussed the matter, I believe, over the phone with—possibly with Mr. Whipple and with Mr. Stanton. Just the chronological events, I can't say.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. I show you a copy of a cable dated June 12, 1946, addressed to Engraw and signed 'Metcalf Distillers,' and ask you whether you sent that cable. (Handing to witness.)

A. I sent that cable.

Q. The cable reads as follows: "Reply to your cable our negotiations had been carried on with Whipple [620] Los Angeles who has been kept fully informed of our position. Regret exceedingly confused situation which has developed and suggest you advise me Schenley New York of extent of your uncancellable commitments. Also telephoned Whipple today." Did you receive any instructions from anyone in Schenley to send this cable, or did you send it of your own volition?

A. I can't recall specifically the exact circumstances.

Q. Did you subsequent to the sending of this cable have a telephone conversation with Whipple as you suggested you intended to have?

A. That's right.

Q. To whom did you speak? To Mr. Whipple, or to Mr. Stanton?

A. I think I talked to both of them in the course of a few days.

Q. You mean, there were two telephone calls?

A. I think there were even more than two.

Q. And what did you tell Whipple?

A. I can't recall, of course, the exact conversation, but I tried to develope how a commitment

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

could have been carried on in Argentine, material bought by an experienced export house before the irrevocable letter of credit had been—had been opened and the formal [621] order had been issued, and that was part of the conversation that I had with him.

Q. And didn't Mr. Whipple tell you that it was because of Schenley's reputation that this order was accepted and carried out?

A. Export business isn't done on a reputation.

Q. Don't you know that export business cannot be done if they had to wait for interoffice communications between various cities in the United States pending the purchase by the person offering the Glucose?

A. The guts of an export contract is a letter of credit, and I have never known an export—an exporter to make a commitment before the letter of credit, or the order—the formal order had been issued.

Q. Notwithstanding the fact that a commodity like Glucose has a fluctuating market price?

Mr. Pickett: Mr. Mesirov, I don't want to in any way impede you from getting the facts, but it seems to me we are now engaged in a series of arguments between the attorney and the witness. We had started by inquiring as to a conversation between Whipple and this witness, and I think we have gone pretty far from that.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Mr. Mesirov: Well, Mr. Pickett, I think he went pretty far in saying what opinion he expressed, and I am [622] merely testing his opinion.

Mr. Pickett: Well, sir, what difference does it make what his opinion was? If it was right, it was right. If it was wrong, it was wrong.

Mr. Mesirov: I am asking this witness as to his experience. He said his experience was such and such. I asked him whether it isn't true that this is a commodity where the market fluctuates and, therefore, a seller could not wait for these transactions if they——

Mr. Pickett: (Interposing) Mr. Mesirov, it seems to me we are going very far afield, but if you want to, go ahead.

Mr. Mesirov: Let him answer.

The Witness: That is a risk that the buyer has to take; that the seller never should take. If he can't conform with the terms of sale, then there is no deal until your letter of credit has been opened. It is my experience I am only speaking of.

Q. (By Mr. Mesirov): Now, do you remember the substance of your conversation with Mr. Stanton just about that time?

A. I think I asked Mr. Stanton to confirm what the situation was out there, and since I had talked to Mr. Whipple, and I think that I told him that we were desirous of not completing the contract.

Q. And what? Is that all you told him?

A. Well, that was the substance of it.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Didn't you tell Mr. Stanton that Schenley would be responsible for any loss that would occur and for Engraw—

A. I had no authority to make that statement.

Mr. Pickett: The question, sir, was whether you told it to him. That can be answered yes or no. (To Mr. Mesirov) I am sorry for the interruption, but I would like to get responsive answers to the questions.

Mr. Mesirov: Please read the question.

(Last question read back.)

Q. By Mr. Mesirov, (Cont'd): —and for Engraw to do whatever they think best to minimize such loss? A. No.

Q. You did not. Was there any conversation with reference to the fifty tons?

A. Yes, I can recall vaguely that that was—that I was told that fifty tons was—had already been purchased and was ready for shipment, although it is not clear in my mind whether or not the export license had ever been obtained. Somewhere, vaguely, I am under the impression that there was no export license.

Q. Did you tell him that Schenley would pay for at least the fifty tons? [624]

Mr. Pickett: Is this Mr. Stanton, sir?

Mr. Mesirov: Yes, I am still talking about the conversation with Stanton.

A. I can't recall.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Didn't you tell Stanton that you would like Engraw to say, "We are going to cancel this contract, and it is going to cost you so much money"?

A. Will you repeat that question?

(Last question read back.)

The Witness: Does that require a yes or no?

Mr. Mesirov: You can say yes or no, and if you want to explain, you can add whatever you want to.

The Witness: Well, my answer to the question is no, but—we had—I mean, we had a conversation over the telephone regarding this, and I may have asked, not told, what certain situations were.

Q. (By Mr. Mesirov): You asked what?

A. What certain situations were. I wasn't in the position, you know, to do any telling.

Q. You mean you were in no position to conclude any arrangement with Engraw with regard to the cancellation?

A. That's right. I mean I was in the capacity of a consultant, and I was no doubt developing what the situation was as far as Stanton and his clients were concerned [625] and trying to piece together how Schenley fitted into the picture.

Q. By that, what do you mean? By "Schenley fitted into the picture?"

A. Well, what measures could be taken to—in this situation.

Q. Measures taken by whom?

A. By both parties.

Plaintiff's Exhibit S—(Continued)
(Deposition of Charles W. Metcalf.)

Q. Did anyone of Schenley tell you that there was no contract for the purchase of this Glucose?

A. No.

Q. Isn't it a fact that you were told that there was a contract, and you were asked as to the method of disposing of the Glucose or the contracts so as to minimize the loss to Schenley?

A. Well, your use of the word 'contract' does not conform with my experience. A letter is not a contract, sir, and——

Q. Pardon me. I have not asked you that.

A. I understood that was the question.

Q. I asked you whether you were told by Schenley that they had——

A. (Interposing) No, I took the initiative——

Q. (Cont'd) ——consulted you about that subject. A. ——on this Glucose matter. [626]

Q. By 'initiative' do you mean that you told Schenley that they had no contract—no completed contract?

A. No, sir, I didn't tell them that.

Q. Now I ask you again whether Schenley told you that there was a binding contract and asked you to see what could be done in the way of cancellation with the least possible expense.

A. The answer is no.

Q. Did they tell you that there was no completed contract? And that they were not bound by anything that Mr. Donnelly had given?

A. No, they didn't do that.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. They didn't do that either? A. No.

Q. Well, tell us why you were continuing your interest in this transaction if so far as you understood there was no purchase—no completed purchase?

A. Well, I had satisfied myself that this Glucose was not needed and that inasmuch as in my judgment that was the case, I recommended, and continued to recommend that we not conclude the arrangement which was to have signed the order and opened the letter of credit.

Q. And why did you continue your communications with Engraw after you had come to that conclusion? [627]

A. To try and find out what the real situation was.

Q. In what respect?

A. Whether or not a commitment had been made for the materials down there. Whether—what the situation was regarding export licenses and so forth.

Q. Did you or did you not find that a commitment had been made?

A. I was told that a commitment had been made.

Q. Having been informed that a commitment had been made, how did that affect your subsequent actions in the matter?

A. When I finally came to the conclusion that a commitment had been made, then it was a matter

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

for Schenley's legal department to handle and not for me to handle.

Q. In other words, the information as to commitment was——

A. (Interposing) I mean now the commitment on the part of Engraw for Glucose.

Q. Yes, so I understood. After you received that information, you felt that you had completed your investigation of the matter.

A. I felt that I had gone as far as—as I was justified in going, and then it became a legal matter for the legal department.

Q. Had you been authorized to negotiate a cancellation [628] of these contracts by Engraw with the people to whom they were committed?

A. Not definitely authorized, but I did try to find out what the measure of cost would be.

Q. You know, of course, Mr. Dichter, who is here today? A. Yes, sir.

Q. Did you communicate with Mr. Dichter with reference to this transaction? A. I did.

Q. And what did you tell him to do?

A. I told him to proceed from where he was—I think it was Rio—to Buenos Aires to find out what the situation was regarding the Glucose market in general, and to also see the principals to determine to his satisfaction whether or not a commitment had been made.

Q. By Engraw?

A. By Engraw for the Glucose.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. For the Glucose. And he reported to you the result of his investigation? A. He did.

Q. To what effect?

A. That a commitment had been made by Engrew for the materials; that the market at that time was slightly higher than the price that had been paid for the material. [629]

Q. After that report, what did you tell him to do?

A. I told him to come back, but there were some other conversations in between.

Q. Come back where?

A. Come back to New York, or back to Brazil, and then to New York.

Q. Did you tell him to do anything further with reference to the Glucose situation?

A. Not that I recall.

Q. Was his report over the telephone or by a letter?

A. He reported over the phone, and, I think, by cable, too.

Q. Is it your recollection that you did receive a cabled report from Dichter?

A. No, I wouldn't say that, but I did receive a report over the telephone.

Q. Did you make a memorandum of that—a written memorandum?

A. No, to the best of my knowledge, I did not.

Q. You did not. After he reported that a commitment had been made, and that the market was

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

strong, or a little higher—I used your words—a little higher than the contract price, did you give him any further [630] instructions in connection with the Glucose?

A. I don't think you have this thing very well in mind. It was a recommendation——

Mr. Mesirov: I was not there.

The Witness: I see.

Mr. Pickett: May I make this suggestion, Mr. Mesirov? Would it be agreeable to you if you asked Mr. Metcalf to tell what went on between him and Dichter—everything that was said?

Mr. Mesirov: That is what I am trying to get.

The Witness: I can tell you that, if you want me to?

Mr. Mesirov: I didn't ask for a lot of conversation, but I asked him whether he gave any further instructions.

The Witness: There is one conversation that I recall very clearly, and I think Mr. Berger was on the telephone, on an extension, with Mr. Dichter, and Mr. Dichter did report that the commitment had been made; that the market was fair, and there was a joint suggestion that Schenley conclude this contract by opening the letter of credit for at least part of the amount, and Engraw would liquidate that material for the account of Schenley.

Q. (By Mr. Mesirov): I show you a copy of a cable addressed to you at Schenley Distillers, New York, dated July 8, 1946, signed 'Engraw Dichter

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Berger' reading as follows: "Cancellation here would cost \$45,000. Stop. However, [631] opening of letter of credit would at once eliminate penalty to extent of \$30,000. and would provide necessary time for orderly liquidation of contract period which is for balance 1946. Stop. Also, sale over such extended period should further reduce probable loss, if any, to nominal amount. Therefore, we suggest we act as your agents to liquidate using our judgment as to manner of liquidation having in mind reduction of loss to minimum or entirely. Stop. If agreeable, please advise so we can inform contractors and open letter of credit through First Boston. These calculations don't cover Whipple. Will you deal with him directly? Envwraw Dichter Berger."

Do you recall receiving this paper? (Handing to witness.) A. Yes.

Q. Now, Mr. Metcalf, I will go back to my original inquiry. What instructions did you give Mr. Dichter following his first report to you which led to the sending of this telegram or this cable?

Mr. Pickett: I am going to object to the form of that question insofar as it embodies a conclusion "which led to the sending of this telegram." I have no objection to the balance of it.

Mr. Mesirov: Very well.

Q. (By Mr. Mesirov): I now again ask you what instructions you gave [632] Mr. Dichter after you received his first report, or between the time

Plaintiff's Exhibit S—(Continued)
(Deposition of Charles W. Metcalf.)

you received his first report and this cable?

A. Well, I think that Mr. Dichter reported to me over the telephone what the situation was. He also went on, on his own initiative, as I recall, to develop a solution to this problem, and I think this cable was the result of conversations between Mr. Dichter and Engraw after that conversation. I certainly did not instruct Dichter to make any settlement, or make any arrangements. He was down there to find out what the situation was and explore the matter thoroughly.

Q. I understood you to say that all that you had instructed Mr. Dichter to do was to find out the market on Glucose and whether or not Engraw had actually committed themselves for the obtaining of the entire quantity of Glucose. Is that correct? A. Yes, he reported on that situation.

Q. That is not the answer. I asked you whether that was the only instruction that you had given him in connection with this matter or in connection with his trip to Buenos Aires.

A. Well, those were the instructions.

Q. And he reported—— A. That's right.

Q. ——as you stated before.

A. That's right. [633]

Q. And do you mean to tell me that entirely on his own initiative he joined Engraw in figuring out a plan of liquidation on account of Schenley without having had any instructions, without having

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

had previous knowledge, except such as he might have obtained from Engraw?

A. I might have told Mr. Dichter over the telephone to develop what the measure of loss would be to Engraw, but they were not instructions.

Q. What distinction do you draw between instructions and telling him?

A. When you instruct a person, that is what they are to do. When you ask him to develop something in the sort of an exploratory way, that is the difference I put on the thing.

Q. Mr. Metcalf, I show you five typewritten pages designated as interoffice communication from Mr. G. Fred Berger to Mr. E. R. Dichter, subject: Glucose Contracts; and ask you whether you have ever seen this memorandum. (Handing to witness.)

A. Yes, I have.

Q. Where?

A. In the office of the Schenley Corporation.

Q. Was that memorandum brought to you by Mr. Dichter? A. I can't recall. [634]

Q. But the original was delivered to Schenley?

A. Whether it was sent by mail or delivered, I can't recall that.

Q. After receiving and reading this memorandum, did you do anything further in connection with it? A. No, not that I recall.

Q. Isn't it a fact that this memorandum was in the nature of an additional report handed to you by Mr. Dichter, or sent to you by Mr. Dichter?

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

A. Well, since it originated from Mr. Berger, as well as Mr. Dichter, I didn't necessarily consider it as in the form of a report. It was more in the form of a suggestion.

Q. Going back to the cable that I read to you signed 'Engraw Dichter Berger,' under date of July 8, 1946, did you have a telephone conversation jointly with Mr. Dichter and Mr. Berger in which you stated that you were satisfied to leave the question of liquidation or cancellation in their hands together with Dr. Goytia, who then represented Schenley in Argentina?

Mr. Pickett: I am going to object to so much of that statement which characterizes as whom Dr. Goytia represented.

Mr. Mesirov: We will strike out whom he represented.

The Witness: The answer is no. [635]

Q. (By Mr. Mesirov): You did not?

A. No, I had no authority to, and if I had, the thing would probably have been liquidated in accordance with——

Q. In accordance with what?

A. With their judgment, because that was what they asked us to do, to rely on their judgment to liquidate this thing.

Q. And did you refuse to rely on their judgment to do so?

A. I had no authority to say yes or no, but I certainly would not have done it.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Mr. Mesirov: Off the record.

(Discussion off the record.)

Q. (By Mr. Mesirov): You are positive that whether acting on your own initiative, or under instructions from officers of Schenley, that you did not say to either Engraw or Dichter or Dr. Goytia, all, to go ahead and try to arrange for a cancellation or liquidation of the contracts between Engraw and the producers or the people from whom they obtained it?

A. The answer to that is no.

Q. One other question: Did Schenley have an agent in Buenos Aires or any other place in Argentina? [636]

A. I can't answer that; I don't know.

Mr. Mesirov: That is all.

Cross-Examination

By Mr. Pickett:

Q. Mr. Metcalf, in answer to certain questions, you were talking about your experience in this field of purchasing products. What experience did you have prior to these conversations about which you have testified?

A. Well, the most recent experience was the purchase of several thousand dollars of Manioc meal from certain houses.

Mr. Mesirov: I object to that as highly irrelevant.

Mr. Pickett: Sir, my question was confined to

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

experience prior to the time that he had the conversations about which he testified.

Mr. Mesirov: So, you see, his answer, in my opinion, is not responsive.

Q. (By Mr. Pickett): Do you understand my question, sir? Will you tell us what your experience in this field had been prior to the time you first learned about this Glucose transaction?

A. Well, I have been in purchasing for the last twenty-five years, and while it is true that it did not involve the purchase of materials from—that had to be imported continuously, nevertheless, throughout that [637] experience there had been purchases going back to the Twenty's of sugar from Java and various other countries, and gelatin from Holland, and so on and so forth up to the Manioc meal for Schenley.

Q. I believe your attention was called to a telephone conversation following a document which is dated June 11, 1946. That was a conversation which you had with Mr. Whipple. Do you remember the substance of that conversation? You gave us only part of it on your direct examination.

A. Will you read back the part that I gave so that I can fill in if there was anything——

Mr. Mesirov: Off the record.

(Discussion off the record.)

Q (By Mr. Pickett): Suppose we say in the early part of June, 1946, you had a telephone conversation with Mr. Whipple. A. Yes?

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Now, as best you can recollect, what was the substance of that conversation?

A. Well, I tried to develop what the real situation was in relation to this Glucose matter to find out all I could about it so that we could form a conclusion as to what to do.

Q. As best as you can recall, what is the substance of what Mr. Whipple told you? [638]

A. He told me that fifty tons—that he was definite that fifty tons had been bought; that he wasn't positive about the rest of the materials; that he expected that—I think it was Whipple or Stanton—that they sold this material, and that they would develop whether or not all of the commitments had been made.

Q. Who had sold this material?

A. He had, for the account of Engraw to Schenley.

Q. You inquired of Mr. Whipple whether Engraw had purchased the amount of Glucose referred to in Mr. Donnelly's letter?

A. That's right.

Q. And what did Mr. Whipple tell you?

A. He told me he was sure fifty tons had been purchased because it was for rather prompt shipment, but the balance he wasn't sure, but that he would develop it.

Q. Did you discuss with Mr. Whipple at that time the letter of credit?

A. There was no discussion regarding the letter

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

of credit. I may have told him a letter of credit had not been opened, which I knew.

Mr. Pickett: Will you read the answer?

(Last answer read back.)

Q. (By Mr. Pickett): Did you inquire of Mr. Whipple why Engraw had [639] purchased the fifty tons, about which you have already testified, prior to the opening of the letter of credit?

A. Yes.

Q. What did he say?

A. As I recall, he said that it was—a prompt shipment was required, and the material was available, and it was bought for prompt shipment.

Q. Did you ask him why that had been done prior to the issuance of the letter of credit?

Mr. Mesirov: I object to your form of the question. You are leading the witness.

Mr. Pickett: This is a cross-examination, sir.

Mr. Mesirov: Well, I still object to it.

Mr. Pickett: Will you read the last question?

(Last question read back.)

The Witness: Yes, I did.

Q. (By Mr. Pickett): What did Mr. Whipple say? A. I don't recall.

Q. Did you ask Mr. Whipple at that time anything about a sample of Glucose?

A. I can't answer that yes or no.

Q. You don't remember?

A. I don't remember, no.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Q. Did you inquire of Mr. Whipple who had—strike [640] that—you say that you had a telephone conversation with Mr. Stanton?

A. That's right.

Q. Did you call him or did he call you?

A. I think there was more than one call. I think that he called me originally, and I think that I called him back on at least one occasion.

Q. The first telephone conversation which you had with Mr. Stanton was after your telephone conversation with Mr. Whipple? A. Yes.

Q. But you don't remember when?

A. Remember when?

Q. Yes.

A. It was within a matter of days.

Q. After Mr. Whipple had spoken to you?

A. That's right.

Q. Did Mr. Stanton say whom he represented?

A. Yes.

Q. What did he say?

A. He said he represented Mr. Whipple.

Q. Did he say he represented Engraw?

A. I don't recall.

Q. What was the substance of your telephone conversation with Mr. Stanton on that occasion?

A. Well, the subject of the contract—the so-called order—was discussed, and our previous conversations with Mr. Whipple were discussed, and he stated that he was representing Whipple, and

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

then we tried to develop what the—what damage, if any, had been incurred on this thing.

Q. What did Mr. Stanton say about that?

A. I don't recall.

Q. Did you say you had another conversation with Mr. Stanton over the telephone?

A. Yes, but the conversations were about the same subject.

Q. Did Mr. Stanton ever tell you the amount of damage which was claimed? I am talking about the telephone conversation.

A. Specifically, no.

Q. In the course of these telephone conversations with Mr. Stanton and Mr. Whipple, did you at any time ever say to either of them that Schenley had contracted to buy the Glucose, which was the subject of Mr. Donnelly's letter? A. No.

Q. After your telephone conversation with Mr. Stanton, you spoke to Mr. Dichter?

A. There was quite a lapse, I think, of time in between that, but that is the sequence of events.

Q. You had not spoke to Mr. Dichter before speaking [642] to Mr. Stanton? A. Oh, no.

Q. Or Mr. Whipple? A. No, no.

Q. By the way, during your conversations with Mr. Whipple and Mr. Stanton, was the subject of export licenses mentioned?

A. I can't recall that.

Q. After Mr. Dichter was in Buenos Aires, you had at least one telephone call with him and Mr.

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

Berger of Engraw jointly? A. That's right.

Q. Did you have more than one such telephone conversation? A. In a three-way hookup.

Q. Did you speak to Mr. Berger when Mr. Dichter was not on the phone?

A. No, not to the best of my knowledge.

Q. Did you speak of anyone at Engraw other than Mr. Berger? A. No.

Q. During this telephone conversation between Mr. Berger, Mr. Dichter, and yourself, was the subject of export licenses mentioned?

A. Specifically, I don't know whether they were mentioned or not, but they were in our minds.

Q. Well, do you recall whether anything was said [643] about export licenses?

A. No, it wasn't, to the best of my recollection.

Mr. Pickett: May I see that cable of July 8th, please, Mr. Mesirov?

(Handing paper to Mr. Pickett.)

Q. You were shown this cable signed 'Engraw Dichter Berger' dated July 8. In that cable you will notice a reference to "eliminate penalty to extent of \$30,000." (Handing to witness.) When you had the telephone conversation with Mr. Dichter and Mr. Berger jointly, was the subject of that penalty discussed? A. Yes.

Q. What was said by either Mr. Dichter or Mr. Berger?

A. I think that Mr. Dichter told me that this

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

contract had been registered with some agency in—the chamber of commerce.

Q. Which contract, sir?

A. This contract between Engraw and the people that they had bought the Glucose from—the suppliers—had been registered, and that to cancel that contract would involve a penalty.

Q. Was the amount of the penalty mentioned?

A. It may have been, but I don't recall.

Q. Was anything said as to what the nature of this [644] penalty was?

A. Well, it is not clear in my mind what the nature of the penalty was, but I was under the impression that it was——

Mr. Mesirov: I will object to his stating his impression.

Mr. Pickett: Don't tell us your impression, Mr. Metcalf; we don't expect you to remember exact words of conversation.

Mr. Mesirov: Off the record.

(Discussion off the record.)

The Witness: Will you ask your question again?

Q. (By Mr. Pickett): I have been asking as to what was said by either Mr. Berger or Mr. Dichter regarding this so-called penalty during that three-way conversation that you had—the substance of it.

A. I can't recall that. It was too long ago.

Redirect Examination

By Mr. Mesirov:

Q. You were asked about your experience in

Plaintiff's Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

purchases on letters of credit. Where did you gain the experience? In what country?

A. I was executive vice-president for the General Foods Corporation, the largest food company in the world, and I had charge of their buying.

Q. During what period? [645]

A. From 1925 to 1945—1927 to 1945.

Q. And where were the foods purchased?

A. I beg your pardon?

Q. Where were the foods purchased?

A. We brought coffee in from Brazil. We brought cocoa in from Brazil and Africa, and we brought tea in from India, and so on and so forth.

Q. Since you attempted to testify as an expert, let me ask you this: Where you have a large quantity—an offer of a large quantity, and you are accepting that offer with a fluctuating market such as Glucose had, would you still say that it was proper for the seller to wait until some other communications were sent, besides the acceptance and letter of credit issued?

A. This was the first business, to the best of my knowledge, that Engraw ever had done with Schenley, and it was on a commodity that isn't usually bought by Schenley, and under those circumstances, when the terms of the contract are letter of credit, I think that that is true.

Mr. Pickett: Think that what is true, sir?

The Witness: I think that it is very unusual for the exporter to make the commitment until the let-

Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

ter of credit has been opened and he has been advised of it.

Q. (By Mr. Mesirov): And is it your opinion, as an expert, that [646] notwithstanding the rapid fluctuation of the Glucose market and the fact that an offer was acknowledged and accepted by a concern so well known for its financial ability to meet contractual obligations, that the seller should still have waited?

A. I don't think the fluctuation——

Mr. Pickett: (Interposing) Just a moment, please. I am going to object to the form of that question on the ground that it assumes that an offer had been accepted. It assumes facts which have not been shown, that there were wide fluctuations in the price of Glucose. Those are my objections as to form. I think there are several objections as to substance, but under the rules they don't have to be presented.

Mr. Mesirov: Well, let me ask a supplemental question, then.

Q. (By Mr. Mesirov): Did you know the Glucose market at that time?

A. No, sir, not in the Argentine.

Q. You did not know? A. No.

Q. Then I still ask you to answer my question subject to objection.

A. I don't think the price, or the fluctuating price, has anything to do with the method of doing an import-export business. I think that it is a

Exhibit S—(Continued)

(Deposition of Charles W. Metcalf.)

matter of policy, [647] and if Engraw's policy was to go ahead and make his commitment before he got his letters of credit, that was his business.

Q. Don't you know, as a matter of fact, that, for instance, in the wool industry, which involves very large amounts in the way of purchases, that sales are made without any formalities or letters of credit?

A. I know nothing about the wool business.

In the District Court of the United States for the
Southern District of California

COMPANIA ENGRAW COMMERCIAL E
INDUSTRIAL S. A., a corporation

Plaintiff

vs.

SCHENLEY DISTILLERS CORPORATION,
a corporation

Defendant.

The foregoing testimony of said Charles W. Metcalf being from pages 3 to 41 both inclusive was duly sworn and subscribed to before me by said Charles W. Metcalf this 12th day of December, 1947.

/s/ CHARLES W. METCALF

Sworn and subscribed to before me by said Charles W. Metcalf this 12th day of December, A.D. 1947.

/s/ JAMES B. KILSHEIMER, JR.

The Court: All right.

Mr. Bronson: We offer next, your Honor, the depositions taken on Commission in Buenos Aires of Doctor Mario Robiola and Doctor Eduardo Caranza.

The Court: Wait a minute, just a minute. This is really where my clerk needs help.

Mr. Bronson: While your clerk is looking that up I was going to suggest, your Honor, with regard to the volume that you hold in your hand now, that that is an exhibit in the deposition of Mr. Ditiheim. I read the thing over and in my halting Spanish I found no reference in it to the glucose market, and I think a reference to the witness' deposition will show that he put it in just to show that the Bolsa down there gets out that periodical giving quotations on what they call acciones there. That is stock, isn't it?

The Court: Yes.

Mr. Bronson: And commodities. And then it has also the balance sheets and financial sheets of various corporations. As an exercise in Spanish I went over it page by page and did not find the word "glucose" even mentioned in there.

The Court: I can't tell at the present time.

Mr. Bronson: It is going to fatten the record terribly if included. I thought counsel might agree to withdraw it [649] but apparently he does not.

The Court: Well, it is a very interesting essay. Gentlemen, I think, by just glancing at it hastily, reading a proof-reader's eye, very, very fast examination, I can't see what relevancy this has. This

is a thesis presented to the university by Eduardo Martinez Carannza, and the title of it is the theory of the occasional act in the doctrine, in theory, and in the civil code. When I look at the preface——

Mr. Bronson: I am referring to an entirely different book. I am sorry. That is a part of the deposition of one of our defendants, but there is a bulletin or journal.

The Court: Well, I have the wrong one. I will finish with this one. Maybe it will come back later on. What it deals with is the doctrine of responsibility for damages foreseen and unforeseen, just like our distinction between damages flowing from a breach of contract and that from tort. They illustrate it in the cases which say that in contract only what flows directly, and that unforeseen things or special conditions must be pleaded. So this one, he says, he deals merely with unusual situations, what the French would call *force majeure*.

Mr. Bronson: I address my remarks to the journal and ask the counsel to stipulate, if they are willing to, that in the interests of keeping the record within the [650] bounds, that it be removed as an exhibit from the deposition of Ditisheim.

Mr. L. B. Stanton: I will swap with you. You take your book out and I will take that out.

Mr. Bronson: I think that is about right. I don't like to make trades in the court room. We generally do that out of the court room.

The Court: Let me see your book. Will you locate the one wherever it may be so we will know. Let us pass that for a moment, gentlemen. When

the transcriber brings back the copy of the deposition we will try to locate it.

Mr. Bronson: I offer the deposition, first, of Dr. Mario Robiola.

Mr. L. B. Stanton: We have numerous objections to these depositions.

The Clerk: Do you wish the interrogatories marked first?

Mr. Bronson: I think, if you will follow the same procedure that you did with the others it will be agreeable.

The Court: All right.

The Clerk: Defendant's Exhibit T is the Commission to Take Depositions on Written Interrogatories plus the interrogatories, plus the cross-interrogatories; Defendant's Exhibit T in evidence.

The Court: All right. It may be received subject to [651] the same rule I laid down for the others that the plaintiff may make specific objections to answers that were given to certain interrogatories.

The Clerk: Defendant's Exhibit T-1 in evidence is the deposition of Mario Robiola. That is Defendant's Exhibit T-1 in evidence.

Mr. Bronson: Shall I proceed to make an offer of the remaining ones before the objections are heard?

Mr. L. B. Stanton: They are all the same questions.

The Court: I think if you offer them all, then we may save time, just as we did in the case of the other depositions.

Mr. Bronson: All right. I offer next the deposition of Eduardo Carranza and the preliminary papers.

The Clerk: That is Defendant's Exhibit T-2 in evidence.

The Court: That is the gentleman whose book I referred to.

Mr. Bronson: I next offer the deposition of Adolfo Magdalena.

The Court: All right.

The Clerk: The deposition of Adolfo Magdalena is Defendant's Exhibit T-3 in evidence.

(Defendant's Exhibit T set out on pages 877 to 890; Defendant's Exhibit T-1 set out on pages 891 to 904; Defendant's Exhibit T-2 set out on pages 905 to 925 and Defendant's Exhibit T-3 set out on pages 926 to 943.)

The Court: What did you say?

Mr. L. B. Stanton: I asked counsel if he is offering his treatise, likewise.

The Court: No. 7?

Mr. Rowe: Well, it goes with the deposition.

The Court: Well, gentlemen, if they bear in any way upon the subject, we have a provision in the rules which allow us to make an order to transmit the bulky exhibits direct to the higher court, and that order can be general or it can be special. We had to adopt the rule where we have maps and things like that and where we have physical exhibits, such as in patent cases, so that if you feel that they have a bearing and either of you is willing to waive whatever relevancy the documents may

have, I am just suggesting that that will be a method that can be adopted to shorten any record on appeal.

Mr. Bronson: That would answer the purpose.

The Court: In the meantime, I can direct the reporters not to copy the foreign exhibits, written in foreign languages, into any record we will refer to. It would be very difficult for them to type Spanish, anyway, because you have to have a special typewriter to write Spanish.

Mr. Bronson: Such an order is agreeable to us, your Honor.

The Court: Well, with that, you need not have any worry and I am doing it now, before the case is completed, [653] before we know what the ultimate decision is going to be. You have not completed your case yet. And I assure you, insofar as it lies in my power, I am going to assist you, under all of the rules, in order to shorten any record, within any reasonable limitation. That will be the understanding, that those books or magazines or treatises are merely referred to by a legend, that by order of Court the physical exhibits are not to be transcribed into the record.

Mr. L. B. Stanton: These depositions, your Honor, all relate, as I gather from a reading of them, to the defense:

“As A Further, Separate, Affirmative Defense” of the defendant, which states in their pleading, “the export of glucose from the Argentine Republic to any other country was strictly prohibited by the

laws of the Argentine Republic Nos. 12.591, 12.830 and Article 14 of Law No. 15.591,"——

That was changed by amendment to 12.591——

“——and regulations and orders regularly passed and made thereunder, during the period during which deliveries pursuant to the terms of said alleged contract were to be made by plaintiff at a West Coast Port of the United States of America.”

Now, in the first instance, I wish to make formal objection that the pleading is insufficient for the purposes of introducing the evidence which has been produced here. The [654] pleadings call for two laws, numbers 12.591 and 12.830, and says that by these laws the export of glucose was strictly prohibited. That in itself is an insufficient pleading. The rule on pleading is that under foreign laws, that is a question of fact and it is a question of fact which must be pleaded as a question of fact.

41 Am. Jr. 296 states:

“Where it is not otherwise provided by statute, the courts do not take judicial notice of the laws of a foreign state, and where such statutes are material to the controversy and are relied on as a basis of a right of action or as a defense, they must be set forth by the pleader so that the court may judge of their effect.” [655]

The Court: That is not the rule in the Federal Courts. He is dealing with State courts there. That is not the rule in Federal Courts, because we are specially given jurisdiction of causes between foreign corporations and citizens of the United States. Therefore, the times comes when we are called upon

to interpret, and the only rule that applies in our courts is that we do not take judicial notice of them as we do of the courts of the United States and the court where we sit but we must have proof.

Furthermore, under the modern system of pleading, you could say effectively in an answer that a contract was illegal by the laws of Argentina, regarding export because that was forbidden, and that would be sufficient, and then it would be a question of proof. Our pleading now has become what you call notice pleading.

Mr. L. B. Stanton: That is right, it is notice pleading, but, your Honor, we must have notice.

The Court: You have notice. They do not have to give you the law and describe it for you. They say it is forbidden. They say it is forbidden. You can't cite any law in the United States, any Federal or high court opinion which holds that you cannot prove a foreign law in a court; that you have to give it in detail and give the language of it; that is not the law and never has been the law.

Mr. L. B. Stanton: I don't think it is. I haven't been [656] able to find a thorough monograph on that. 134 A.L.R., at 574——

The Court: I am not going by the State laws. One of the objects of the Federal Courts is remedy for a conflict between foreign citizens. This Court has original jurisdiction of actions brought by a foreign citizen and therefore the law of that nation comes before the Court. We have jurisdiction, as I said, under 41-A, of causes arising between citizens

of foreign countries and citizens of the United States.

Mr. L. B. Stanton: We have no notice in this case here of what regulations or orders were passed.

The Court: They don't have to give you the number. It is up to them to prove. I agree with you that they cannot go by generalities. They have to refer to them so that you can identify them.

Mr. L. B. Stanton: But they have been referred to here. That is the point. That is the point in this case. They say, "and regulations and orders regularly passed and made thereunder,"—

The Court: The objection will be overruled. I say they have to prove—furthermore, one of the witnesses said they were all wrong about characterizing, someone was wrong about characterizing—I have just taken a glance at one of these—a certain thing, by a certain number and calling it the law, and [657] that it was merely a regulation.

So that when a person puts in a pleading a reference to a foreign statute, he has given you a sufficient knowledge that he pleads invalidity under that law. If he was bound to give you the exact page and number, that would delay his answer, if you were entitled to accurate information, which of course could not come from him, unless he has personal acquaintance with the law of that country.

Mr. L. B. Stanton: I have no objection to the laws—the only question I have is as to the pleading of "regulations and orders regularly passed and made thereunder,"—and that calls upon a person to

look into a whole volume of Argentine law, and we are not placed upon notice in that regard.

The Court: Well, the objection is overruled.

Before we go on, I want to straighten out the record and refer to this document, to which reference was made in the deposition which you offered. It is Exhibit A accompanying the testimony of Luis Ditisheim and it is entitled Bulletin of the Stock Exchange of Buenos Aires and it is No. 22223, Volume XLIII, of November 17, 1947, and it is a book consisting of quite a number of pages, the paging beginning on page 930 and ending at page 1068, and it will be understood that as for this exhibit the same rule would apply, that the reporters need not transcribe it, it may merely be referred to [658] as Exhibit A of the deposition and will be considered a part of it. Then it will be, in proper time, transmitted to the Courts of Appeal as an exhibit if the situation warrants. All right. I merely wanted to identify it.

All right, what is your next point?

Mr. L. B. Stanton: The next point is that the sole order on which they claim is a verbal order, that none of the parties who were making the depositions were present at the time it was made; they learned about it, they generally state, "From information which has been given me." That is one statement. Another statement says they learned it from some known man. They don't say whether he was in the Department at all or anything about it.

The other says he learned it from a colleague, to get the background of it.

It was unquestionably a law or a rule, which as the witnesses state was passed by a revolutionary government which was not acting in accordance with the constitutional system, and I am referring in this respect to the answer of the witness Robiola to the fifth interrogatory. He gives various illustrations of how this government did not act under their law at all, in violation of the constitutional law, but that simply no one was in disagreement with him. That I submit, your Honor, is not any regulation or order which was regularly passed or made under this law 12,591. It is also [659] clearly hearsay testimony of whatever that law might have been.

The Court: All right.

Mr. L. B. Stanton: There is nothing to show what the full contents of that law is. The witnesses vary among themselves in regard to what it was. None of their testimony is direct to the point as to what the law was and their testimony is based upon the fact *there* there was some verbal order. Yet, they state in so many words that on the Bolstein Bolsa orders were required to be published. That goes to the basis of the validity of the whole deposition.

The Court: Well, I think that goes to weight admissibility. We cannot apply to any foreign country with the ideas of due processes which obtain in the United States. There is no country in the world, with the exception of pre-Schussnig Austria, which had any doctrine like ours, which allows courts to invalidate laws which are not constitutional. Ours, of course, was developed, the doctrine

of judicial supremacy was developed judicially by the Supreme Court beginning with *Marberry vs. Madison*.

I take judicial notice of the fact that that principle is an American doctrine purely. It does not obtain in England. It never has obtained in England, from whom we borrow the basis of our system, and the mere fact that an ordinance is required to be in writing does not prohibit the Government either [660] legitimate or illegitimate, when *de facto* or *de jure*, from making a regulation. If that regulation was actually in effect and it was binding upon the person who entered into such a contract, that was binding on him and he cannot show any foreign country's court that he was not bound by it unless he could show that he had a remedy in the country itself where he could question that decree.

So that ultimate, if, as a matter of fact, by reason of a verbal authority, he couldn't and did not get a license, then, he cannot claim that he could have gotten it because it was unconstitutional unless he could show that he has resort, as we have in the United States, to courts to stay the hands of an administrative body. They have them. They have them in France. I don't know what the Spanish word is for them. They call them *contentieux administratif*, and that is a single proceeding whereby they can enforce administrative and governmental bodies to desist from doing something illegal. Of course, that is the essence of due process in this country, but, even in this country the Government

cannot be sued except with its own consent and the courts can only make a declaration. We have a good illustration in the famous case of Berg against Hull, where the State Department declined to issue a passport to a young woman who was born in the United States, of Swedish parents, and the parents returned to Sweden and remained there longer than two [661] years after they became naturalized, which meant that they automatically lost their citizenship. The young lady came back to this country, after she became 21 years of age, and expressed her desire to become an American citizen, which she had a right to, and then applied for a passport. The State Department did not issue a passport. She brought an action in declaratory judgment and the Supreme Court held that she had a right to the passport and made a declaration, although they said they could not issue an order.

So, assuming everything that you say correctly represents what these people testified to, that goes to the weight and the admissibility. They may be inquired into, for the reasons I have already indicated.

Mr. L. B. Stanton: Your Honor, as you very clearly stated, our pleading is a notice pleading, but, when we are notified of an order regularly passed and made and then they come up with some verbal order made on hearsay testimony, if they are relying on a hearsay order, if they are relying on a verbal order, they certainly should have pleaded it.

The Court: When you are talking about statutes and ordinances, you have to rely on those, unless

you show that it was required that all of these orders be written and published.

Mr. L. B. Stanton: That is exactly the thing the depositions do say.

The Court: Well, that the law required it——

Mr. L. B. Stanton: That is exactly what the depositions do say.

The Court: All right, but, if as a matter of fact, in fact the ruling was enforced and the man couldn't obtain it and he should have known that that was the fact, it does not make any difference whether the people who declared he did, did it legally or illegally, if he is forbidden by a government, whether it is revolutionary or not. I don't know what government you are referring to.

Mr. L. B. Stanton: That argument is all right, if it is pleaded; then we have a fact to meet, but here we have an entirely different set-up. On the set-up of this pleading, we have here a country operating under normal conditions, passing laws in a normal way. The fact on the thing, as shown in this deposition, is that it was a revolutionary government which was practically an anarchy so far as the words of the deposition are concerned. We have no notice, we have no notice on the things to meet. That is exactly the point of this argument.

The Court: Well, the objection is overruled.

Mr. L. B. Stanton: There are various laws cited in these depositions which were passed subsequent to the time of the whole question involved here and they relate back by reason of the fact that these

laws subsequently passed, that they justified the legality of the verbal order. [663]

The Court: Well, that is a question of argument, whether a Government can do that. We forget, we forget especially in the realm of Federal law that it was not until after the Supreme Court invalidated the N.L.A.R. and the Hot Oil case, that the Government established a register called the Federal Register in which they publish regularly, so that anybody can find all the rules and regulations which are published.

Furthermore, in constitutional law, it is not generally good constitutional law that a law cannot be retroactive, although the solution has been that it is. It is not the law. A lot of people confound retroactiveness with *ex post facto*. The Constitution forbids an *ex post facto* law, that is one which punishes someone for an offense which was not an offense when committed, but statutes may be retroactive and the Supreme Court had said so repeatedly. Every tax bill that we pass is made retroactive. For instance, the current tax bill on which you are going to pay for this year has not even been passed for this present year and it will be passed and when it is passed it will go back until January 1st, and the Supreme Court has repeatedly had occasion to say that and I myself have applied it to various cases. So that we cannot argue, when we are dealing with a Latin system which is patterned after the European system and based on Roman law. The Roman law did not limit the power of the State.

There are no [664] Bills of Rights in some of the Constitutions. There are some in the Constitution of France. There are some even in some of the South American Republics, but there is no constitutional doctrine that the parliament of a country not governed by a common law cannot make a retroactive statute, because that is not even good American law.

I think all of these matters are matters to argue at the time of the general argument. They don't go to the admissibility. In other words, I, in interpreting their law, have to place myself in their position and I cannot apply American illustrations to their law.

Mr. L. B. Stanton: I was certainly under the idea, until your Honor spoke, that a person had to have actual knowledge of the thing before they could give testimony in regard to it. They could not give testimony on purely a hearsay matter. This man comes along and says that he wanted——

The Court: That is merely a statement, when a man says that a certain custom obtained. Supposing this: We know that the law prescribes how to go about to get a passport. Nevertheless, if you went to get a passport, you would find all sorts of customs which obtain here, which are ordered from Washington, and which may delay you and prevent you from getting it within a certain time. You are absolutely powerless. The reason for that is that certain customs and [665] practices have developed and requirements are not inconsistent and even in

our country, the courts have held repeatedly that if you apply our rules and regulations, certain questions are answered by all and they will be respected in the courts. Now, I haven't read them all. I have merely glanced through them. Furthermore, the rule here does not apply there and the rule here isn't objectionable when you are proving it as a fact. Now, that is not hearsay. That is not hearsay. Let me give you an illustration.

When you cross the border into the United States from Mexico, they stop your car and they ask you a question, which I have said repeatedly no person has a right to ask because I do not find anything in the law on it and the question is, "Where were you born?" Now, you could decline to answer it, in which event you would be stopped at the border and you might stay there until you get a writ of habeas corpus. Now, what the laws says is this, that they have a right to inquire and have a right to be in the United States, and I have repeatedly, from the bench in San Diego, admonished the officers that they are absolutely doing something that is illegal. One of the Judges, being born in this country, merely because he had a Germanic name, the late Judge Hauser, was humiliated and stopped at the frontier over an hour by such questions. I myself, in self defense, because I was not born in this country, carry what I call [666] a charter passport and when they ask me, "Where were you born?" I do not answer the question, but I just show them my passport and a permit to cross the border.

So that what we are confronted with in this case is not the proposition of whether the order was legal under Argentine law or not. If the order was in actual effect there at the time and you could not obtain an export permit, that is a question to be considered by the Court.

Mr. L. B. Stanton: But that is an entirely different question from what is pleaded, that is an entirely different defense than what is pleaded. If we had had that defense pleaded, we would have had to meet it.

The Court: The objection is overruled. You can argue that point later on. I am not going to stop this case on the question of pleading, now, I will say that much about it. If you are taken by surprise, by these answers, before the case is submitted, if you want to ask for additional depositions, I may allow you at the proper time to take additional depositions to prove these oral matters, before you conclude the case.

Mr. Bronson: Shall we proceed, now?

The Court: Yes, go ahead.

Mr. Bronson: Mr. Donnelly, will you take the stand? [667]

JOSEPH B. DONNELLY,

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bronson:

The Clerk: What is your name, please?

The Witness: Joseph B. Donnelly.

Q. (By Mr. Bronson): Mr. Donnelly, you hold a position in the defendant's company, Schenley Distilleries Corporation, do you not?

A. Yes, sir.

Q. What is it?

A. I am production manager of West Coast Operations.

Q. And there are some subsidiary companies in which you hold an officership, is that not true?

A. That is right.

Q. What company or companies?

A. Schenley Distilleries, Incorporated, Three Feathers Distilling Company, California Vineyards Association, Cresta Blanca Wine Company.

Q. Now, reference has been made to a letter signed by *by* you and dated May 23rd. In the pleadings filed by the plaintiff in this case, it is marked as Exhibit A. You have examined that letter during the course of this litigation, haven't you, and are familiar with it? [668]

A. Yes, I have.

Q. That is the letter dated May 23rd to which, under your signature, you put a postscript. You recall the letter, do you?

A. Yes, sir, I do.

(Testimony of Joseph B. Donnelly.)

Q. Now, that was addressed to Harold A. Whipple who has been on the witness stand in this case. Can you tell us approximately what day you first knew Mr. Whipple, first heard of him?

A. The first day I heard of Mr. Whipple was on either May 10th or 11th. I think it was the 10th, at which time one of our salesmen in Los Angeles handed me a memo, a slip of paper with Mr. Whipple's name on it, a telephone number, and told me that Mr. Whipple was able to secure some glucose and wanted to know whether I was interested in finding out about it.

Q. What did you do at that time?

A. I took the memo and I was unable to call Mr. Whipple that day, because I was busy and I called him the next day while I was still in Los Angeles. I told him who I was and asked him if it was true. He said yes. He told me at that time that he was able to secure glucose, that would be above the ceiling price and he assured me that it would not affect our sugar quota and that it was legal to bring it into the United States. That was all of the conversation. [669]

Q. All right. Does your company in fact use quantities of sugar, that is, use chemical stuff of that kind in any of your products?

A. Yes, I think we use it. How much I couldn't say, but we use it in our cordial manufactures back East and a small amount out here on the Coast in cordial manufacture.

(Testimony of Joseph B. Donnelly.)

Q. And at that time were there quotas applied to manufacturers using sugar?

A. There was a quota.

Q. Now, Mr. Donnelly, did you have any subsequent conversations with Mr. Whipple and if so, state when and what was said, up to the time of this letter of May 23rd?

A. Well, I left Los Angeles, went back to San Francisco, and then contacted our Eastern offices, to find out if we were interested in securing any glucose and found out that we were interested and they asked me to look into it. I called Mr. Whipple on May 14th, I am pretty sure it was the 14th, from San Francisco, told him that we were interested in Glucose and at that time he gave me some additional information. It went somewhat to the effect—he gave me the price, I think it was 22.3 cents.

Q. You are speaking of American currency?

A. I am speaking of American money, yes. And at that time he stated that he had available 1300 tons; that 300 tons was a prior commitment. So therefore, there was only 1000 [670] tons available; that he might be able to secure the extra 300; that he had samples in the United States and they had been delivered to somebody else; that he would try to get those samples back to deliver to us, but if he couldn't he would cable South America and ask them to ship us additional samples; he mentioned that it was crystal clear and he mentioned the Baume content of the glucose.

(Testimony of Joseph B. Donnelly.)

He failed to mention whether duty was included in that price. He gave me approximately shipping dates. I think it went something like 50 tons in June or July and then 100 tons for a few months and then the balance in December, if I remember rightly. I have a memo of that, but that is as far as my recollection goes. We ended the conversation, then. No other commitment was made.

A few days later——

Q. That concluded the substance of what you recall of the May 14th, if that is the correct date, conversation with Mr. Whipple?

A. That is right.

Q. You were then in San Francisco and he in Los Angeles, correct? A. That is correct.

Q. Now, did you talk to him again at any time before this letter was sent out, that has a date May 23rd and contains a postscript? [671]

A. No, I did not speak to Whipple in that interval.

Q. You had no conversation with him?

A. No conversation at all.

Q. Well, is it your testimony that the last date you conversed with Mr. Whipple was on May 14th?

A. I conversed with him on May 14th and then I believe on May 24th.

Q. May 24th? A. That is right.

Q. Now, I am using this copy of this letter. It is in evidence. It is No. 5 for the plaintiff, I will hand you Plaintiff's Exhibit 5 and you can follow

(Testimony of Joseph B. Donnelly.)

that. It bears date May 23rd and you refer to the next conversation you had as being May 24th. Do you know whether this letter dated May 23rd had been sent at the time you talked to Mr. Whipple on this third occasion?

A. The letter had not been sent.

Q. And will you state what occurred in that conversation?

A. Well, on May 24th I called Mr. Whipple because he had placed a call for me and I wasn't in, so it was his origination of the call, but I called him and he advised me, then, that he could secure 1,135 tons, it shows in the letter here, and a shipping schedule, and I acknowledged that and told him that I had already written him a letter [672] on a previous 600 tons and stated that I would write him another letter on the 1,135.

After I got through talking to him, I found out that the letter had not been transcribed as yet, it was still in the secretary's notebook, and so I added this postscript to my May 23rd letter.

Q. At the time that you had dictated this letter of May 23rd down to but not including the postscript, had you received any communication with regard to glucose coming from Mr. Whipple through Mr. Baglin? A. Yes, sir, I had.

Q. And Mr. Baglin is what relationship to you in the Schenley organization?

A. Mr. Baglin is my assistant.

Q. And what did you learn from Mr. Baglin

(Testimony of Joseph B. Donnelly.)

as to the subject matter of the opening portion of this letter?

Mr. L. B. Stanton: That is hearsay. Mr. Baglin is here in court.

The Court: Well, unless it was communicated to Whipple at the time of the discussion, I don't think it would be material.

Mr. Bronson: Now, the question is as to what information he had from Mr. Baglin bearing on the opening portion of the letter.

Mr. L. B. Stanton: It is hearsay and I object to it [673] on that ground.

Mr. Bronson: Well, all right, if you insist on the objection, it may be good. I am not so sure of it.

The Court: Well, I think the objection is good because it calls for an interpretation of the letter. If the letter is ambiguous and it refers to something else or refers to this information, then, all right.

Mr. Bronson: I will withdraw it, your Honor.

Q. Will you state, if you know, how much glucose had been offered by Mr. Whipple up until the time of your conversation with him on the 24th of May? A. 600 tons.

Q. And is that the 600 tons that you referred to in the postscript of the letter of May 23rd?

A. That is right.

Q. Reading the second paragraph of the opening portion of the letter, it states:

"A purchase order will be sent to Cia. Engraw Comercial & Industrial S. A. as soon as possible covering this purchase, and a letter of credit will be

(Testimony of Joseph B. Donnelly.)

set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month."

Now, in this conversation that you had with Mr. Whipple on May 24th, before this letter was sent, was the subject [674] of a purchase order discussed between you and him?

A. I told Mr. Whipple at that time when I spoke to him, that I had acknowledged his offer of 600 tons in a letter that I had dictated already to him and that I was forwarding that onto Cincinnati and would request them to issue the purchase order and the letter of credit in connection therewith.

Then he told me, in that same conversation, that he now had 1135 tons available and, maybe to clear this up: Since the first conversation with Mr. Whipple, at the time I wrote this letter there had been various quantities and shipping dates reported to me by Mr. Baglin, which I assume—or rather that I happen to know he got from Mr. Whipple, and all of them were nebulous, nothing that you could actually make a report on until the 600 ton offer came through, and that was the first one that was reported.

Q. (By Mr. Bronson): You did, then, in the course of this conversation on May 24th by phone with Mr. Whipple discuss the subject of the purchase order?

A. That is right.

Q. And you told him what about the purchase

(Testimony of Joseph B. Donnelly.)

order, as to where it was prepared and how it would be prepared, if anything?

Mr. L. B. Stanton: I object, that counsel is leading the witness. [675]

The Court: Well, I think it is permissible to direct attention to particular conversation. I know especially business men have the custom, which is attributed to lawyers, that they like to go into details. If you direct the attention of the witness to the conversation, that is permissible. Then, the contents of the conversation may follow. All right, you may answer.

The Witness: Yes. I did mention that to Mr. Whipple, because prior to——

The Court: No, no. Don't give any reason. [676]

Now, just answer the question without giving any reasons.

Mr. Bronson: Yes; what was said by you in connection with the purchase order?

A. I mentioned to Mr. Whipple that I would request a purchase order and a letter of credit to be issued from the East.

Q. Now, taking up the purchase order first, I have here and I have shown this to counsel who has one, a form under the heading Schenley Distillers Corporation and stating above that "Purchase Order." What is this document? It is blank, of course.

A. This is our standard form of purchase order.

Q. Do you know if that is used throughout the organization in that form?

(Testimony of Joseph B. Donnelly.)

A. Yes, sir; that is.

Q. I notice this one has somewhere on here a reference to San Francisco, does it?

A. That is right. It says "Sign and return copy No. 2 attached" to San Francisco.

Q. This is made out in 15 copies in all cases, is it?

A. Yes; 15 copies.

Q. I call your attention here to a second copy which is on pink paper as distinguished from the top one which is on white. That contains in the lower left "Vendor's [677] Acknowledgment Vendor to Sign and Return This Copy to the Company at 800 Tennessee Street, San Francisco 7, Calif. Accepted by Vendor." Then a blank line with the words beneath "Authorized Signature," and after that another blank line with the subscription "title." In handling these purchase orders what is required of the seller on that copy?

A. His signature.

Mr. L. B. Stanton: We object as being not a part of this case and not a part of any conversation with Mr. Whipple. It is merely with regard to the contents of the purchase order.

Mr. Bronson: I will possibly cure it. The witness has already answered but I will ask him this:

Q. Was this the purchase order, or a purchase order of this exact type with the possible exception of the "San Francisco" that you were referring to in the conversation with Mr. Whipple?

A. It is.

(Testimony of Joseph B. Donnelly.)

Mr. L. B. Stanton: I will object to the question upon the same ground. There is no testimony that this form of purchase order was ever submitted to Mr. Whipple or he knew anything about it. It is only hearsay from that angle.

Mr. Bronson: I am offering now—well, wait a minute. I don't know whether I have an answer. Will you read the [678] question back?

Mr. L. B. Stanton: I entered that objection.

The Court: I can't hear you.

Mr. L. B. Stanton: I ask that that objection be entered. It is an attempt to vary the terms of a written instrument.

The Court: Oh, no. The objection will be overruled. In view of the liberality I adopted in allowing all the written communications to be gone into, I certainly am not going to establish a rigid rule now.

Mr. L. B. Stanton: I appreciate that, your Honor. I make the objection for the sake of the record.

The Court: Well, that is all right. And I state for the sake of the record that when I adopt a liberal rule in allowing testimony, it applies to both sides, and not only to one side. I allowed all the evidence in, and I think it was by Whipple himself that there was some talk of a purchase order. I don't know whether that word appears. And if a contract is not complete, it is permissible to show that it was understood that other conditions were

(Testimony of Joseph B. Donnelly.)

to be complied with, and if there are not inconsistent with the writing, the rule which forbids the modification of a writing does not apply.

Mr. Bronson: I will offer into evidence the purchase order, just the second copy, the one that is numbered 2, [679] and has provision for the signature of the buyer. There are 15 copies altogether to the form, all more or less followed the same scheme.

The Clerk: Is this admitted, your Honor?

The Court: Why don't you receive them as one exhibit?

Mr. Bronson: I am puffing the record up again and it is all right. It may go in as one. It is quite all right.

The Court: They relate to one subject and they are merely the form used for that particular purpose. They may be received.

The Clerk: This is the Defendant's Exhibit U in evidence.

(Defendant's Exhibit U set out on pages 943, to 953.) [680]

Q. (By Mr. Bronson): In that conversation did you explain or state to Mr. Whipple what office in the East would issue your purchase order?

A. I believe I might have, but that is hard to say. If I did mention it, it would have been Cincinnati, because that would have been the office that it would come out of.

(Testimony of Joseph B. Donnelly.)

Mr. L. B. Stanton: I move to strike that.

The Court: That may be stricken beginning with "if I did mention it." The first part, "I believe I mentioned it," that sentence may stay.

The Witness: I believe I did.

The Court: That may stay; the other one may go out.

Q. (By Mr. Bronson): Well, generally, you stated a moment ago that you mentioned the subject of a letter of credit in the conversation on May 24, 1946 with Mr. Whipple. What was said on that subject?

A. I told Mr. Whipple that a letter of credit would have to come from the East because I was unfamiliar with them and did not even know what form they would be made out in, and that would have to come from New York which is our head office.

Q. Can you state whether any transactions in foreign trade or in large transactions such as the amount of money that was involved in the purchase of this glucose, the letter of credit would be handled on the west coast or the [681] east coast?

A. It would have to be handled in New York. Since I have been in California we have never handled a letter of credit. That is since 1938 when we established——

Q. Do you know anything about the form that that document takes?

A. I don't know a thing about a letter of credit,

(Testimony of Joseph B. Donnelly.)

except I know they are in various forms. I have never even seen one.

Q. You know that they are in various forms?

A. That is right.

Q. In the conversation that you mentioned you stated that the letter of credit would be issued from the East?

A. That is right.

Q. Did Mr. Whipple in that conversation ask you or did you discuss with him anything about the various types, any one of the various types of letters of credit that might be used?

A. No, sir.

Q. Was anything said about the terms of the payment?

A. No.

Q. That would be reflected on the letter of credit?

A. No.

Q. Was anything said between you in that conversation about the length of time that the letter of credit would [682] extend?

A. No; there was no conversation about that.

Q. I am referring you—will you look at the letter before you?

A. Yes.

Q. It says there toward the end of the opening portion of the letter: "Expiration date" referring to the letter of credit, "will be October 30, 1946, or as confirmed."

A. That is right.

Q. Where did you get that information from?

A. That was information I got from Mr. Baglin.

Q. Did Mr. Baglin in recounting the matter to you say anything about what the expiration date or

(Testimony of Joseph B. Donnelly.)

as confirmed meant? Did you have any information on that subject?

Mr. L. B. Stanton: Object on the ground it is hearsay.

The Court: That will be sustained unless that was communicated to Whipple.

Mr. Bronson: All right; let us withdraw the question and put it this way:

Q. In the conversation between you and Mr. Whipple the expiration date was not mentioned, I believe you said?

A. That is right; it was not mentioned.

Q. At the end of that conversation you attached this postscript, and I am calling your attention to the expression in the next to the last sentence—last two sentences, [683] rather: “The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.” Was that subject discussed between you and Mr. Whipple in the May 24th conversation just preceding the writing?

A. I don’t understand your question. What do you mean by “was that subject discussed”?

Q. Was the question of the conditions, the condition of the issuance of a purchase order and a letter of credit——

A. Oh, yes.

Q. ——in the manner you have described?

A. When Mr. Whipple called me on the 24th, or, rather, I consider him calling me although I

(Testimony of Joseph B. Donnelly.)

placed the call, as I said before, I told Mr. Whipple that I had written him a letter acknowledging the 600 tons, and mentioned to him about the letter of credit and the purchase order. And then he told me over the phone that he had a new offer of 1135 tons and gave me completely new shipping dates. And I told him that I would acknowledge that offer with the same conditions as the 600 tons.

Q. Now, thereafter did you have any communication with the East on the subject of this letter?

A. Yes. I wrote to Cincinnati, advised them of this letter and sent a copy of it. In fact I had written [684] the letter to Cincinnati on the 23rd, the same time I wrote the first part of the letter to Mr. Whipple, and then added the same postscript to the Cincinnati letter that I did to the letter to Mr. Whipple.

Q. You mentioned two of the conditions that are discussed in the opening portion of the letter, the purchase order and letter of credit. There is another one there. "Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles." Where did that come from, that stipulation in the opening portion of your May 23rd letter?

A. McCormick Steamship Company came from our own traffic department.

Q. When did you get that?

A. I got that probably on May the 22nd or early on the 23rd.

Q. Had there ever been any reference to a steam-

(Testimony of Joseph B. Donnelly.)

ship line in any prior communication between you and Mr. Whipple?

A. There had never been any reference made to the carrier.

Q. This may be a repetition. Referring both to the purchase order and the letter of credit was there any discussion between you and Mr. Whipple in any of the conversations as to the contents and makeup of either document? [685]

A. No, sir; there was not.

Q. Just one further question, Mr. Donnelly. It has reference to an expression in some letter or letters from Mr. Whipple directed to Mr. Baglin. Did you in the course of your discussions ever discuss metric tons or distinguish metric tons from the ordinary ton that we deal with of 2,000 pounds in your discussion with Mr. Whipple?

A. No; at no time.

Mr. Bronson: That is all.

The Court: All right, cross-examine.

Cross-Examination

By Mr. E. B. Stanton:

Q. You never mentioned anything to Mr. Whipple at any time about ever requiring the signature of Engraw for anything, did you?

A. No, sir; I did not.

Q. At that time, at least, you personally knew nothing about the issuance of letters of credit, did you?

A. May I qualify when you say "at that time," what date are you speaking of?

(Testimony of Joseph B. Donnelly.)

Q. I am speaking of the time of May 23rd and May 24, 1946. You were not familiar with the process yourself?

A. That is right; I was not familiar.

Q. You personally had the authority to sign that purchase order or any purchase order for that or any other amount right here on the Pacific Coast, didn't you? [686]

A. Yes; I would say I have the authority.

Q. So there wasn't any reason for you to have to send this thing back to Cincinnati?

A. Is that a question?

Q. That is a question.

The Court: Yes.

A. The reason was that because sugar or glucose is something that I normally do not purchase on the West Coast. I prefer always having that handled in Cincinnati, our main office; and then, secondly, the amount was pretty large and I would prefer our head purchasing organization to handle the purchase order for \$600,000.

The Court: Let me inject a question. Did you inform Mr. Whipple of either or both of those reasons?

The Witness: No; I did not inform him of the reasons. No, sir.

The Court: You merely told him that the purchase order would have to be issued?

The Witness: That is right.

The Court: In the East?

(Testimony of Joseph B. Donnelly.)

The Witness: That is right.

Q. (By Mr. E. B. Stanton): Did you tell him it would have to be issued in the East?

A. I told him it would be issued in Cincinnati in our conversation with him. When I say I told him that—— [687]

The Court: I am sorry I asked that question because he said, as a matter of course, "East." Cincinnati is east for us, but I assume in view of the fact that they have an office in New York, New York would be "East."

Q. (By Mr. E. B. Stanton): By that you were referring to this formal purchase order which you have identified? A. Yes, sir.

Q. You have arranged for purchases many times prior to this occasion without the signature of the formal purchase order, haven't you?

A. I did not hear the last part. I have arranged purchase orders——

Q. You have arranged for purchases——

The Court: You arranged to make purchases without a formal purchase order?

Q. (By Mr. E. B. Stanton): Without the issuance of a formal purchase order, haven't you?

A. I have made arrangements, but none of them have ever been concluded until a purchase order is issued and signed, because that is a rule of our corporation.

Mr. E. B. Stanton: I move to strike that answer as not responsive to the question.

(Testimony of Joseph B. Donnelly.)

The Court: No, no. You asked for it. It will have to remain.

Mr. E. B. Stanton: The latter part, "because that [688] is a rule of our company," is certainly not responsive to the question, your Honor.

The Court: Well, that is not a good objection to this court, anyway, if an answer is material, the mere fact it was not called for in question, unless it is totally foreign. That is merely a reason. He is giving you a reason. He had already stated to Whipple that a purchase order would have to be forthcoming. It is not a good objection. Somebody has put it in the Code of Civil Procedure but we are not bound by it in the Federal Court. I will never strike an answer merely because it is not responsive, if it is material and bears upon the issues.

Q. (By Mr. E. B. Stanton): You considered the method, yourself, prior to May 24th of handling the whole thing right out here without going to Cincinnati, didn't you?

A. No, sir; I did not.

Q. I want you to cast your mind back on this thing very carefully, Mr. Donnelly, and I ask you again, didn't you consider prior to May 24th that you personally could handle the whole thing out here in California? You are the West Coast purchasing department, aren't you; you are the head of it?

(Testimony of Joseph B. Donnelly.)

The Court: You are getting away from your question.

Mr. E. B. Stanton: I will withdraw the question.

The Court: You will have to ask either the first question or the second question. [689]

Mr. E. B. Stanton: I will withdraw the question for the moment.

The Court: Yes.

Q. (By Mr. E. B. Stanton): You personally are the head of the West Coast purchasing department?

A. I guess you would say that since the purchasing agent works directly for me.

Q. Yes.

A. That is right.

Q. You personally prior to May 24th had under advisement, at least, the idea that you would handle this transaction without going through Cincinnati at all?

Mr. Bronson: I will have to object to the form of that question. It calls for a conclusion.

The Court: I am sorry. I was talking to my crier and I missed the import of the last question.

(Question read by the reporter.)

The Court: The objection will be sustained. It has been sufficiently answered by the previous questions.

Mr. E. B. Stanton: All right.

The Court: What he had in mind is not material; it is what he did.

(Testimony of Joseph B. Donnelly.)

Mr. E. B. Stanton: I think, your Honor, it is material for this reason: He claims he told Mr. Whipple this thing had to be handled through Cincinnati. I intend to show by [690] documentary evidence in this man's own letter to which he has referred that he did consider such a thing; that his mind was not made up as to which way he would go; and that he did in fact decide upon a method of proceeding right here from Los Angeles, and that by the wording in this letter he did proceed from Los Angeles.

The Court: That is an argument, and the answer he has given to you to the same question two different ways is sufficient. When a witness has given you a negative answer and I am charitable and allow it to be asked in a different way, you do not have to approach it from all the facets of the art of cross-examination, when he has given you an answer in two ways. I will sustain the objection.

Furthermore, they have admitted that he had authority to sign those agreements, so that that is not material. The main question is whether this agreement was a completed agreement or was not to be effective until other matters had been complied with, and that is the testimony to which this is directed and that is why I allowed you, when Mr. Whipple was on the stand, to go into all the preliminaries and go into all the post-preliminaries so as to see whether this was an absolute understanding, complete in itself, or there were other

(Testimony of Joseph B. Donnelly.)

things to be done later on, because that is the issue that is being made in this case. My reason is more clearly stated now, because I know more about the case than I did when the other testimony was given. All right.

Q. (By Mr. E. B. Stanton): When you stated that you sent a report on the whole transaction and attached a copy, are you referring to a report which you sent to Mr. Carl J. Kiefer? A. I am.

Q. I show you Plaintiff's Exhibit 58 and ask you to examine it and see if that is the letter to which you referred in your direct examination? Note that it has a copy of your letter of May 23rd attached.

A. That is right; that is the letter.

Q. You have examined it all the way through; you know that is——

The Court: He has identified it. He does not have to read every word of it if he admits it.

A. It is my letter.

The Court: It is your letter; all right.

Q. (By Mr. E. B. Stanton): You say you never advised Mr. Whipple at any time that you would require the signature of Engraw in South America to the purchase order or any other document, did you?

A. No; I did not personally advise Mr. Whipple of that.

Q. You did not direct anyone to advise him of that [692] fact, did you?

(Testimony of Joseph B. Donnelly.)

A. I did not direct anyone. I just told Mr. Whipple that I would get a purchase order. A purchase order automatically requires a signature, as I said before, to complete the deal.

Mr. E. B. Stanton: I move to strike that last portion of the answer.

The Court: No. This is cross-examination. You can't argue without having an argument back with the witness. Besides, a glance at the order, I think, shows it is a purchase order. That instrument has become very well known in the last 10 years, especially since the war.

Mr. E. B. Stanton: I have no further questions.

The Court: All the purchases made by the Government during the war were by purchase order, all the purchases by the big companies, the aviation companies, during the war were made on that basis. And an examination of the blanks show that they call for a signature by both parties, otherwise that would be a unilateral contract.

Mr. Bronson: I have one other question I would like to ask the witness.

The Court: All right; go ahead. [693]

Redirect Examination

By Mr. Bronson:

Q. Would you be buying a half a million dollars worth of glucose without having the signature of the seller agreeing to deliver it?

The Court: Well——

Mr. Bronson: My goodness.

(Testimony of Joseph B. Donnelly.)

The Witness: May I answer that?

Mr. Bronson: There has been no objection.

The Court: There has been no objection made. Did you hear the question? I think young Mr. Stanton—I always forget his name——

Mr. E. B. Stanton: Edward.

The Court: Edward. Off the record:

(Brief comment off the record.)

Mr. E. B. Stanton: May I have the last question read, your Honor?

The Court: Yes. Mr. Bronson noted that you probably did not hear it. It was a leading question and the witness did not answer it, so I will have it read to you.

(Question read by the reporter.)

Mr. E. B. Stanton: I object to the question as leading the witness.

The Court: All right, I will sustain the objection.

Mr. Bronson: You may step down. [694]

Mr. E. B. Stanton: One moment, please. Excuse me just a moment. May I have just a moment?

The Court: All right.

Mr. E. B. Stanton: May I reopen my cross-examination?

The Court: Oh, I am not going to stand on ceremony if you have a question you overlooked.

Q. (By Mr. E. B. Stanton): I call your attention now to this purchase order which is Defendant's Exhibit No. U. On the reverse of the pur-

(Testimony of Joseph B. Donnelly.)

chase order you will note "Terms and Conditions." Will you detail here and now which of those terms and conditions you discussed with Mr. Whipple over the telephone?

A. I discussed none of these terms and conditions with Mr. Whipple over the telephone.

Q. You did not tell him about any one of them?

A. Certainly not. All I told Mr. Whipple was that he would receive a purchase order, and, as I stated before, I expect him to read the fine print.

Q. Did you tell Mr. Whipple that he was going to get the purchase order or that Engraw was going to get the purchase order?

A. No; Engraw was going to get it. You see, at no time did I know Mr. Whipple and Engraw were not the same party. As far as I was concerned Mr. Whipple was an agent for Engraw and they were one and the same party as far as [695] my feelings were concerned.

Mr. E. B. Stanton: Nothing further.

The Court: All right. Step down.

Mr. Bronson: Does your Honor wish to take an adjournment at this time or shall we go ahead?

The Court: How long is this present witness going to be?

Mr. Bronson: Oh, about as long or perhaps a trifle longer than the last witness.

The Court: If there is a possibility of concluding it, go on.

Mr. Bronson: If that is your preference. I don't know.

Mr. E. B. Stanton: Oh, I would say we will have rebuttal testimony in any event, your Honor. We would not be able to finish the case tonight.

The Court: I thought you did not have any rebuttal oral testimony.

Mr. E. B. Stanton: In view of the fact that these depositions were being put in, we will have to have rebuttal testimony for those.

The Court: Well, I did not know.

Mr. E. B. Stanton: Well, in any event I have to recall Mr. Berger for rebuttal testimony.

The Court: Well, that is all right. It suits me very [696] well, gentlemen to adjourn at this time. I merely thought if there was a possibility of concluding with that witness, why, we might do that.

Mr. Bronson: We will conclude tomorrow I am pretty sure.

The Court: All right. Have any rebuttal tomorrow morning.

Mr. E. B. Stanton: Yes, your Honor.

The Court: We will take an adjournment until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m. of the following day, Friday, June 4, 1948.) [697]

Friday, June 4, 1948, 10:00 a.m.

Mr. Bronson: Call Mr. Baglin to the stand, please.

ROBERT H. BAGLIN

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Robert H. Baglin.

The Clerk: The spelling of your last name?

The Witness: B-a-g-l-i-n.

Direct Examination

By Mr. Bronson:

Q. Your name is Robert H. Baglin, is it not?

A. Yes, sir.

Q. And you live at where?

A. San Carlos, California.

Q. You are connected with the Schenley Distillers Corporation? A. I am.

Q. And you are assistant to Mr. Donnelly, a witness in this case yesterday, are you not?

A. I am.

Q. Your office is in San Francisco?

A. Yes, sir.

Q. Are you an officer of any Schenley Company, that is, [700] in the sense of being president, vice-president, secretary, treasurer or assistant to any of those officials?

A. One of the affiliated companies, Schenley Distillers, Inc., I am an assistant secretary.

Q. You were in court yesterday during Mr. Don-

(Testimony of Robert H. Baglin.)

nelly's testimony. I will call your attention, to get right to the matter at once, to an exhibit in this case; it is called Plaintiff's Exhibit 2, being a letter with your signature or a signature over your name, dated May 20th, addressed on the heading of Schenley Distillers Corporation to Harold A. Whipple Company, Los Angeles. Are you familiar with that letter? A. Yes, sir; I am.

Q. I will call your attention to the opening lines: "This will confirm our telephone conversation of today on the subject of Argentine glucose." Did you have a conversation with Mr. Whipple on May 20th, the date of that letter? A. I did.

Q. By telephone? A. By telephone.

Q. And you were where when you talked to Mr. Whipple? A. In my office.

Q. And he was where?

A. In Los Angeles.

Q. In Los Angeles. As to the subject of the conversation [701] between you and Mr. Whipple on that occasion what was it; what was said?

A. I believe that is pretty well covered in my letter, my confirming letter.

Q. You are referring to the exhibit you have in your hand? A. That is right.

Q. So far as you can recall now, was there any subject outside of amenities and things of that sort, additional to the contents of your letter?

A. No, sir; none that I can recall.

(Testimony of Robert H. Baglin.)

Q. You state in the second paragraph: "We are interesting in purchasing up to 1,000 tons." Followed by some shipping schedules and a reference to a possible additional 300 tons. Will you state whether or not you made any statement additional to an expression of interest in the purchase in the conversation you said you had that day?

A. No, sir.

Q. The reference in the letter, Mr. Baglin, to the specifications of the glucose that are contained in the third paragraph, was that also discussed, as you said, in the telephone conversation?

A. It was.

Q. Who specified that particular detail there?

A. Mr. Whipple.

Q. In the same paragraph—I am reading—"It is understood that we will be purchasing by letter of credit direct from the Argentine shipper." Was that subject discussed also in the conversation?

A. Well, we were discussing Argentine glucose.

Q. There is reference there, in the last paragraph, to "We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit." Was that likewise stated in the course of the conversation by you to Mr. Whipple?

A. It was.

Q. Did you have any phone conversations with Mr. Whipple between May 20th and the date upon which—well, I will strike that and call your attention to an exhibit in the case, a wire to—I may be

(Testimony of Robert H. Baglin.)

a little slow getting this, if the Court will bear with me.

The Court: All right.

Mr. Bronson: This has reference, if your Honor please, the next subject of inquiry, to Exhibit No. L for the defendant, reading: "Credit 1135 Issued in New York Through Chase or Bankers Cabling Number Later."

Mr. L. B. Stanton: I can't hear you, Mr. Bronson.

Mr. Bronson: I am reading the wire. "Credit 1135 Issued in New York Through Chase or Bankers Cabling Number [703] Later."

Q. Did you have any discussions up to the 28th of May by phone with Mr. Whipple on the subject of issuance of letters of credit?

A. Yes; I did.

Q. Where did those calls originate from, you or him, in the main?

A. In the main, I would say they originated with Mr. Whipple.

Q. Did you have any discussion with him about May 28th on the subject of what bankers would issue letters of credit or the subject of the banks through which Schenley was dealing in New York, with Mr. Whipple? A. I did.

Q. What was said in that conversation?

A. Well, Mr. Whipple was pressing me for the name of a bank or banks that the letter of credit might be issued through. I told Mr. Whipple that

(Testimony of Robert H. Baglin.)

there was two banks that I knew my company did business with in the East, that is in New York. I named the Bankers Trust and the Chase National Bank.

Q. Will you state whether or not you made any statement on the subject that those banks or either of them would be issuing letters of credit or had issued letters of credit on this transaction? [704]

A. No, sir; I could not do that.

Q. Now, another exhibit is in here. I won't take the time to search for it. It is a wire from Mr. Whipple to Engraw on the 24th of May, Mr. Whipple to Engraw, stating that the letter of credit would be issued the following Monday. I showed you a copy of that wire. Have you that in mind?

A. I know the wire you refer to; yes.

Q. Did you ever have any discussion or make any statement to Mr. Whipple by phone on that subject, promising an issuance of letters of credit on any day?

A. No, sir; I did not.

Q. One other matter referring to the testimony of Mr. Whipple which was before you came to court yesterday, between the 23rd of May and the 28th of May, according to an exhibit entered here there was some conversation by wire between Whipple and Engraw on the subject of 400 additional tons of glucose to the 1135 tons that were referred to in Mr. Donnelly's letter May 23rd. Did you ever have any discussion with Mr. Whipple by phone or other-

(Testimony of Robert H. Baglin.)

wise on the subject of the purchase of 400 additional tons? A. No, sir.

Mr. Bronson: You may cross-examine. [705]

Cross-Examination

By Mr. E. B. Stanton:

Q. With reference to that 400 tons you meant in your answer, Mr. Baglin, from the standpoint of "no, sir"—does that mean a positive statement now that you did not have any conversation about the 400 tons, or does it mean that you do not remember whether or not you had such a conversation?

A. I am referring to 1946 production now.

Q. I don't believe that quite answers my question.

A. Well, I make that stipulation for the reason that some 1947 production was discussed.

Q. And did you discuss 400 tons for 1947?

A. I do not recall the quantity of 400 tons; no, sir.

Q. Did Mr. Whipple say anything to you about 200, an additional two to four hundred tons that he had received a communication from his principals in Argentine? This was after the 1135-ton transaction, he had received a communication from the Argentine in which they had available an additional two to four hundred tons?

A. Of 1946 production?

Q. No; regardless of whether it is 1946 or 1947, do you remember that he communicated to you that he had received word from the Argentine that there

(Testimony of Robert H. Baglin.)

was an additional two to four hundred tons available? [706]

A. No, sir; I do not recall a conversation of any additional two to four hundred that you speak of.

Q. That is for either 1946 or 1947?

A. I won't say for 1947.

Q. In other words, it might have been possible for 1947? A. That is right.

Q. And it is also possible that you told him that you would be interested in that for 1947 at that time, isn't it? A. No, sir.

Q. Did you receive the copy of a letter which Mr. Whipple sent to Many Blanc?

A. I did, sir.

Q. What did you do with that copy when you received it? A. It went to the files.

Q. Was it turned over to Mr. Woolsey?

A. Subsequently, yes.

Q. This was the first transaction that your office had been involved in in the purchase of South American glucose, wasn't it? A. It was.

Q. In fact you had not purchased any glucose prior to this time, had you? [707] A. No, sir.

Q. And this was your first contact with a South American shipper, too, wasn't it?

A. That is right.

Q. So you were not just too familiar with the procedure, then? A. I was not. [708]

Q. (By Mr. E. B. Stanton): You had been told by Mr. Donnelly that the company required this

(Testimony of Robert H. Baglin.)

glucose for immediate delivery, hadn't you? They needed it right then?

A. No, I can't recall that.

Q. Did Mr. Donnelly tell you that the company required the glucose for immediate delivery and needed a continuity of shipments?

A. Yes, that is correct, the continuity of shipments, but not the matter of immediate delivery, I don't recall that.

Q. Well, you recall having your deposition taken on the 22nd of July?

Mr. Bronson: We will waive the formality of identification of it and stipulate that it was taken on the date that you mention and that the answers given in answer to the questions were as transcribed in the copy you have, assuming it is the same as ours.

Mr. E. B. Stanton: Thank you.

Q. I call your attention to this page 41 of your deposition, line 25:

"Q. Didn't Mr. Donnelly tell you about the requirement for immediate delivery?

"A. Yes."

The Witness: Yes.

Q. (By Mr. E. B. Stanton): Does that refresh your recollection, now? [709]

A. Well, I believe I will have to question the word "immediately."

Q. You made that statement at that time, however?

A. In that deposition.

(Testimony of Robert H. Baglin.)

Mr. Bronson: In answer to that question, as you put the words, I will stipulate to that, counsel.

Q. (By Mr. E. B. Stanton): You discussed this matter of 1947 production with Mr. Donnelly?

A. Briefly.

Q. And you left Whipple with the idea that you would negotiate the 1947 production, later?

A. That is right.

Q. Now, along about May 28th you had a discussion with Mr. Whipple about the letter of credit and didn't you tell him at that time that the letter of credit was in the hands "of our Eastern offices"?

A. That is right—the handling of the letter of credit.

Q. That was in the same conversation when you mentioned the matter of banks?

A. I recall that it was, yes.

Mr. E. B. Stanton: Are these the plaintiff's exhibits here?

The Clerk: The plaintiff's exhibits carry numbers.

Mr. E. B. Stanton: Oh, yes. [710]

Q. I will show you Plaintiff's Exhibit 3 and ask you if you recognize that?

(Mr. E. B. Stanton hands said exhibit to the witness.)

A. I do.

Q. And you will note that that is the letter from Mr. Whipple and it states in the first paragraph,

(Testimony of Robert H. Baglin.)

“Confirming our telephone conversation of today,”
—now, does that letter truly reflect the telephone conversation as you recall it?

Mr. Bronson: Is that the letter of May 21st?

Mr. E. B. Stanton: Yes.

A. I would say yes, in substance, it does.

Q. Now, I ask you the same question in respect to Plaintiff's Exhibit 4, I ask you to examine this letter from Harold A. Whipple to your attention and ask you if that reflects, as best you recall, the conversation on the date represented in that letter?

Mr. Bronson: What letter is that?

Mr. E. B. Stanton: That is the letter of May 23rd.

A. No, sir. It does not.

Q. Now, in which respect?

A. Mr. Whipple—

Q. What are you referring to in the letter, first?

A. The letter being directed to my attention and confirming the telephone conversation we had that morning. [711]

Q. I see. You had no telephone conversation that morning? A. I did not.

Q. You had no telephone conversation with Mr. Whipple on the morning of the 23rd?

A. Not conversation—I might have had a telephone conversation, but it was not covering the subject of this letter.

Q. Did you ever write to Mr. Whipple and disaffirm that letter?

(Testimony of Robert H. Baglin.)

A. No, I did not. It was understood that Mr. Whipple had the telephone conversation——

Mr. Bronson: One moment. I move what he understood be stricken.

The Court: Well, you can explain an answer by giving what was said but not your understanding.

The Witness: Mr. Whipple——

The Court: If you want to explain your answer, you may do so.

The Witness: Mr. Whipple had the telephone conversation which he refers to, with Mr. Donnelly.

(A short intermission followed.)

Mr. E. B. Stanton: Excuse me, your Honor. Do you have the exhibits in the Heymsfeld deposition?

In the interests of saving time, while we are getting [712] those exhibits, we could recall Mr. Baglin.

Mr. Bronson: It might be evidence that we can stipulate to. What is it?

Mr. E. B. Stanton: I want to have him examine the record as to the telephone bills, which are in the Heymsfeld deposition exhibits here.

Mr. Bronson: I have it here.

Mr. E. B. Stanton: We have them now.

Q. By stipulation of counsel I am showing you what is a copy of the exhibit attached to the Heymsfeld deposition. I show you a copy of vendor's bill,

(Testimony of Robert H. Baglin.)

vendor Pacific Telephone & Telegraph Company.
Do you know what this record it?

A. Yes, I do.

Q. What is it?

A. Our accounts payable department must have a copy of the vendor's bills in their office, as well as our New York office, so they send to our New York office the vendor's original and they prepare a document like this for the local accounts payable office.

Q. Does this reflect the telephone calls that you made from the period of May 13th through June 3rd?

Mr. Bronson: You mean him individually?

Mr. E. B. Stanton: Him individually.

Mr. Bronson: I think it speaks for itself. It doesn't indicate the individual calling. We will object on the [713] ground that the record is the best evidence of what it shows.

The Court: No. The record may not show.

Mr. E. B. Stanton: The record does not show just who made the calls.

The Court: Therefore he may be asked to explain it. I presume the custom obtains universally that the name of the person who calls is never put down, because that is governed by the number.

Mr. Bronson: I may have misunderstood. I thought he was asked to state if it showed what calls he personally put in.

Mr. E. B. Stanton: That is what I am asking.

(Testimony of Robert H. Baglin.)

The Court: Yes, he is asking whether he was the source of the call, which his telephone bill would not show.

Mr. Bronson: All right.

The Court: Because they charge to the telephone bill all calls which originate from that number and they indicate the person to whom it went unless it is a station to station call.

Mr. Bronson: With that understanding I will withdraw the objection.

The Witness: May I have the question repeated?

(Pending question read by reporter.)

A. On that particular phone, yes.

Mr. E. B. Stanton: I show you the next exhibit. For the record I was there referring to Exhibit——

Mr. Bronson: 10-N.

Mr. E. B. Stanton: ——10-N.

Mr. Bronson: And they are all “N,” but it is the 10th exhibit from the top.

Mr. E. B. Stanton: (Continuing) I was referring to Exhibit 10-N for identification in the Heymsfeld deposition which is now in evidence.

Q. Now, are you aware of the question, now, Mr. Baglin? I am asking you if this record, the second sheet here or the contents of the first sheet on which I questioned you, dated June 11th, carries the telephone calls which you made from June 6th to June 10th?

(Testimony of Robert H. Baglin.)

A. The telephone calls I made, yes.

Q. On that particular phone, these were all your calls?
A. That is right.

Mr. Bronson: May I ask counsel about that: The second sheet of that Exhibit 10-N of the Heymsfeld deposition doesn't have any calls listed for the 6th of June?

Mr. E. B. Stanton: Do those bills correctly show the parties whom you called?

A. That is right.

Mr. E. B. Stanton: That is all. [715]

Redirect Examination

By Mr. Bronson:

Q. Before you leave the stand, counsel asked you about immediate shipment and called your attention to page 41 of the deposition, line 25, reading, "Didn't Mr. Donnelly tell you about the requirement for immediate delivery?"

"A. Yes."

I am reading now the questions and answers that immediately follow that, at the very top of the next page:

"Q. What did he say?"

"A. Well, as I recall, it was possibly discussed, the necessity of our getting a continuity of shipments.

"Q. A continuity of shipments? That is, a shipment every month or so, every month?"

"A. Yes.

(Testimony of Robert H. Baglin.)

“Q. Was there anything said about getting immediate delivery of all the glucose purchased?

“A. Well, I believe that was established earlier.

“Q. When was it established?

“A. Between Mr. Donnelly and Mr. Whipple.”

You gave those answers to those questions, did you not?

The Witness: I did.

Mr. Bronson: That is all.

The Court: All right, step down.

Is there anything further, gentlemen? [716]

Mr. Bronson: May I have just a moment, if your Honor please.

My associate calls my attention to the fact that a letter written on inter-office communication, headed “By Mr. Berger to Mr. Dichter,” and dated August 2nd at Buenos Aires, is objected to by us on the ground that it is self serving, and your Honor sustained the objection. Now, that exhibit is an exhibit also in the Heymsfeld deposition. I was not aware of it when I moved into evidence the entire Heymsfeld deposition. I would like it to be understood as not being offered with that deposition.

The Court: Let us identify it so I will know, gentlemen, when I get to reading your depositions, where it is.

Mr. Bronson: Very well. The exhibit is Exhibit 64-N of the Heymsfeld deposition and it is marked for identification in these proceedings.

The Court: Well, let us give it a number for

identification in this case and then I will know it is not included.

Mr. L. B. Stanton: A number has already been given to it, for identification.

The Court: Pardon me?

Mr. L. B. Stanton: A number has already been given to it for identification.

Mr. Bronson: Exhibit 15, for identification.

The Court: Do you have it? [717]

The Clerk: We have it in a separate file.

The Court: That is all right. It is properly marked. I think this is the original, or is this a duplicate copy? No, I think this is the original of the letter. It is already marked for identification. Then, it will understood that in offering this, the exhibit is not included.

Mr. Bronson: That is right.

The Court: All right. That is sufficient.

Mr. Bronson: That concludes the defendant's case, excepting only on those depositions on letters rogatory.

The Court: All right.

(Whereupon the defendant rested its case in chief.) [718]

The Court: Is there any rebuttal?

(And thereupon the plaintiff, to further maintain the issues on its behalf, offered and introduced the following evidence, in rebuttal, to-wit:)

Mr. L. B. Stanton: We will offer, your Honor, the depositions of Doctors Horacio Beccar Varela and Dr. Alberto Padilla.

The Court: Let us get them. Just a minute until the Clerk identifies them individually and gives them numbers.

The Clerk: Does counsel know where those depositions are?

Mr. L. B. Stanton: They are in that file of depositions which came from South America.

The Court: In this group.

Mr. L. B. Stanton: I think they are all in one file.

The Court: Can you separate those from the group?

Mr. L. B. Stanton: They are Dr. Horacio Beccar Varela and Dr. Alberto Padilla.

The Clerk: The deposition of Dr. Horacio Beccar Varela is marked Plaintiff's Exhibit 61. Is this admitted, your Honor?

The Court: What?

The Clerk: Is this admitted?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 61 in evidence. And is the other also admitted, your Honor? [719]

The Court: Yes.

The Clerk: The deposition of Alberto Padilla is marked Plaintiff's Exhibit 62 in evidence.

Mr. L. B. Stanton: I think I may also offer, at this time, the report of the United States Consul

on the request to take the deposition of the official of the Argentine Government. It deals with export licenses.

Mr. Bronson: May I see what it is?

The Court: Is there something, Mr. Clerk?

The Clerk: These gentlemen don't identify the documents. Is that something already in?

Mr. L. B. Stanton: It is in the batch, here, Mr. Clerk.

The Clerk: What you are offering is the certificate of Mr. Trowbridge?

Mr. L. B. Stanton: Of Jones R. Trowbridge, consul of the United States of America.

The Clerk: Certifying to the nonappearance of Hector A. R. Alfonso?

Mr. L. B. Stanton: Correct.

The Clerk: That is marked as Plaintiff's Exhibit 63, in evidence.

Mr. E. B. Stanton: Mr. Berger. [720]

G. FRED BERGER

recalled as a witness herein on behalf of the plaintiff, in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. E. B. Stanton:

Q. Mr. Berger, in your experience as an importer and exporter operating an import-export firm, you had occasion to deal with contracts in

(Testimony of G. Fred Berger.)

which there were letters of credit such as were proposed in this case? A. Continuously.

Mr. Bronson: We object to that because it contains matters not in evidence, the "letters of credit." The terms haven't been discussed.

Mr. E. B. Stanton: I didn't say anything about the terms.

The Court: This may be—I think you inquired into that generally on direct examination. I will consider that as a preliminary question. I don't know what you seek to produce at this time. This witness was examined in chief and at that time he was asked, when the question was raised, whether he was qualified to determine as to custom which obtained as to letters of credit and as to the time it would take for a certain letter of credit to come through you, and I think he gave generally his experience.

Mr. E. B. Stanton: By the way of explanation [721] your Honor, this is rebuttal testimony to certain portions of the Metcalf deposition which was introduced by the defendant.

The Court: Well, as long as I have not had the time, gentlemen, to read the depositions, you will have to call my attention to it, before I can determine whether it is material or not.

Mr. E. B. Stanton: Yes. All right. On page 14 of the Metcalf deposition there appears the question:

"Q. Don't you know that export business cannot be done if they had to wait for interoffice commu-

(Testimony of G. Fred Berger.)

nications between various cities in the United States pending the purchase by the person offering the glucose?

“A. The guts of an export contract is a letter of credit, and I have never known an exporter to make a commitment before the letter of credit or the formal order had been issued.”

Now, I had intended to produce testimony by this witness to rebut that particular statement in this deposition.

The Court: That sounds like a cross-examination question that was asked of Metcalf.

Mr. E. B. Stanton: That is correct.

The Court: Well, all right.

Mr. Bronson: This was the plaintiff's deposition of Mr. Metcalf, if your Honor please, that he just read from. [722]

The Court: Well, of course, I say it is cross-examination. It is in the nature of cross-examination.

Mr. Bronson: I don't think so, your Honor. I may be wrong in this, but——

The Court: Well, who offered it?

Mr. Bronson: We offered it, but Metcalf, when they took the deposition, was no longer an employee and had not been; in fact, he said he was never employed——

The Court: Of course, if you offered it, they have a right to contradict it, regardless of the matter of who took it. All right. You may answer.

(Question read by reporter.) [723]

(Testimony of G. Fred Berger.)

The Witness: May I have the question, please?

(Question read by the reporter.)

A. Yes.

Q. (By Mr. E. B. Stanton): Approximately how many times?

A. Well, we deal in that type of transaction practically daily because our commitments are made with various firms in the United States, and always are made either by telephone conversation or by cable asking us to make purchases, and the letters of credit invariably follow.

Q. Do you make commitments as a matter of practice in the Argentine before you receive the actual letter of credit?

A. We would have to make them immediately because, under the circumstances of a market which fluctuates and on which given prices are provided over an optional period, you would either have to close at once or you do not get your goods. So those transactions always are completed immediately once we know definitely that the party wants the goods.

Q. Referring to the three-way conversation between Mr. Metcalf, Mr. Dichter and yourself that took place, I believe you stated, in the early part of July when you and Dichter were in the Argentine and Metcalf was in New York, what, if anything, do you recall that Mr. Metcalf said [724] with reference to Dr. Goytia?

A. We had discussed the matter of our telegram and the recommendations that were made under it,

(Testimony of G. Fred Berger.)

and Mr. Metcalf stated that they seemed to be all right to him and referred it to Dr. Victor Goytia for the completion of the details. I intervened at the moment to inform Mr. Metcalf that Dr. Goytia was also our attorney, and his reply to that was, "Well, so much the better because, if he knows all about the case, there will be that much less difficulty in arranging details."

Q. The details of what?

A. The details of settlement, of liquidating. It was supposed to be a liquidation, not settlement.

Q. In this conversation, the same conversation, was there any mention by anyone concerned in the conversation, any one of the three parties, of the matter of export licenses? A. No, sir.

Q. Now, as an import-export business man from the Argentine, do you know whether or not there are any publications, trade journals or other publications, which are used by people in that type of business in the Argentine?

A. The majority of that type of business is done through the Bolsa de Comercio—in English, the Stock [725] Exchange—through the commodity division; and in the Stock Exchange Building there is an organization which, from the records of the stock exchange and from customs records, that is, outgoing customs records reports entirely monthly on all shipments that are made of every kind of commodity from the Argentine.

Q. What is the name of that concern?

A. It is Resumen Mensual de Exportacion,

(Testimony of G. Fred Berger.)

which means monthly report. I think it is Resu-men Mensual de Exportacion Bolsa de Comercio. I am not exactly sure about the title, but it is approximately correct.

Q. Is that publication circulated?

A. Oh, yes; it is circulated to all of those of us who are members of the Bolsa. We pay for the service the same as you would for any service of a similar type in this country.

Q. Did you have occasion to use that publication in 1946?

A. We use it all the time. In 1946, of course.

Q. In what respect do you use it?

A. Well, we use it for the purpose of keeping in touch with the movements of goods out of the Argentine and the destination of those goods, so that we can keep our own record of the market straight and follow through with our own suggestions when we want to sell something. [726]

Q. Mr. Berger, I ask you to examine these five folders and tell me, if you know, what they are?

A. There are six of them.

Q. There are six folders?

A. Yes. These are the covers of the monthly report of exportation of the products of the Argentine Republic running from June, 1946, through November, 1946.

Q. You will find in each cover a page. Can you identify that page?

A. Yes; this is the page pertaining particu-

(Testimony of G. Fred Berger.)

larly to glucose and is one of probably a hundred pages in each of these books.

Q. What is this page pertaining to glucose—pertaining to it in what fashion?

A. Pertaining to it, showing—

Mr. Bronson: I think, if your Honor please—just a minute. I am sorry to interrupt you. The record is the best evidence of what it is. And I have to anticipate the fact that we, by excerpting just this one page from each one, haven't in mind there as to what the quantities are or when the exports were made, when the applications for licenses or issuance of license were made. It is utterly silent on those things. We haven't any kind of interpretation of even quantities stated. And in the light of that, for the witness to try to say here, it is putting his interpretation on things and the record is the best evidence.

Mr. L. B. Stanton: They do not show when the license was issued.

Mr. E. B. Stanton: That is our position; that is immaterial in any event.

Mr. L. B. Stanton: They do show when the export was made.

Mr. Bronson: I beg your pardon. Were you addressing me? I did not realize that. I am sorry.

Mr. L. B. Stanton: They do not show the time when the licenses were granted.

The Court: These are dates of export.

Mr. Bronson: Then that is immaterial.

The Court: Monthly summary of exports of fruits.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: It can hardly be immaterial if counsel is taking a position that it was impossible to export glucose during a certain period of time, and here is the trade record which shows that exports were made in May, June, July, August, September, October of 1946, each and every month. It gives the quantity of the glucose exported in each month and by whom it was exported and where the destination was.

Mr. Bronson: Your Honor, I am not here to argue that point, but the answer to it is that it hasn't any meaning, [728] for the simple reason that export licenses are granted and the shipments may not take place for six months thereafter.

Mr. L. B. Stanton: Now you are arguing the case.

Mr. Bronson: So is your son, Mr. Stanton.

The Court: Both of them have been doing that very successfully during the course of the trial, gentlemen. I wonder what there will be left to argument. As I look at the record and see pages upon pages of solid argument that they had, I am inclined to do, as I sometimes do, omit those questions from further argument.

I will overrule the objection. It is a question of what effect is to be given. This is received merely to show, not that licenses were granted, you see, but that exports were made of glucose during a certain period and month. Whether they were legal or illegal, or black market or allowed by the revolutionary government, as Mr. Louis Stanton inti-

(Testimony of G. Fred Berger.)

mated yesterday, we will decide later on; but this merely reveals the fact that they were made.

Mr. L. B. Stanton: For the sake of the record, your Honor, I do not think there is any necessity of copying all this thing into the record. But there is only one line——

The Court: If you identify it, merely to state what it shows, I will read it into the record. Which line?

Mr. L. B. Stanton: Each one has a heading. We have, for instance, this one here: “Glucosa—” thousands of kilos. [729]

The Court: 597.

Mr. L. B. Stanton: We are not interested in refined wheat or borax or any of the other matters, or the advertisement at the bottom of it. I would suggest, therefore, that the——

The Court: I think the easiest way is for someone to read them. If you indicate to me which one you are referring to? The one I have before me, as I read it, has a complete list here of persons.

Mr. L. B. Stanton: Yes.

The Court: Let us see.

Mr. L. B. Stanton: Many of them have not exported.

The Court (Counting): 28.

Mr. L. B. Stanton: Many of them did not export, you see.

The Court: You want this one, by the United States, or do you want the entire list? First, it says Ireland, Switzerland, Palestine, Peru, Venezuela.

(Testimony of G. Fred Berger.)

Mr. L. B. Stanton: I am perfectly willing to hear all of the matters on glucose, but when it refers to oil, Mani——

The Court: On the one as to which the witness——

Mr. Berger: This is——

The Court: Just a minute, please. Just a minute, please. When counsel talk, please do not interfere. [730]

On mine, which is the one which was shown to the witness, that one is crossed and it refers to glucose and has a complete list.

Mr. E. B. Stanton: Yes, sir.

The Court: And it shows imports and exports by some of these companies.

Mr. L. B. Stanton: For instance, what I am talking about you can see, your Honor, here it has other export matters than glucose.

The Court: Well, that is correct. This one has, too.

Mr. L. B. Stanton: I just thought for the sake of the record there was no use in putting in the other exports.

The Court: I will tell you, gentlemen, the rubric which contains “glucose” will have to be copied in its entirety.

Mr. L. B. Stanton: That is correct; that is correct.

The Court: Otherwise we will have to go through and pick out as to each one. So I think we can

(Testimony of G. Fred Berger.)

take these exhibits and mark the "glucose," and then they can set them up in the form of a table as they are here.

Mr. L. B. Stanton: That is right.

The Court: And that will indicate.

Mr. L. B. Stanton: The only thing I wanted to exclude is the wheat and meat, etc.

The Court: That is all right. How many of these have [731] you?

Mr. E. B. Stanton: There are six, your Honor.

The Court: Six of them, all right. We will have to give each a number. Only the portion which is marked with red pencil or in what they call in newspaper parlance "a box"—only the portion which is boxed will be received as an exhibit. We will give each a number in that portion and the portion will be transcribed.

The Clerk: That will be Plaintiff's Exhibit 64 in evidence.

The Court: All right. Let me identify it further. Let us take them in order. What I have said applies to this one, too. The portion boxed on the resume or synopsis which has the legend "June, 1946," will be given the first number.

The Clerk: That is Plaintiff's Exhibit 64 in evidence.

The Court: 64. Mr. Stanton, this one is split up. It does not run across the page. I want to be sure that I am not leaving anything out. You see, this does not run across the page.

(Testimony of G. Fred Berger.)

Mr. L. B. Stanton: Yes.

The Court: So this is merely the corner, the northeast corner from where I am standing looking at it. This is marked "July, 1946." That will be the next number.

The Clerk: Plaintiff's Exhibit 65 in evidence.

The Court: The portion marked on the exhibit which is the summary for August, 1946, will be given the next number.

The Clerk: Plaintiff's 66 in evidence.

The Court: The one of September, which is on the northwest corner of the summary, will be given the next number.

The Clerk: Plaintiff's Exhibit 67 in evidence.

The Court: The one dated October, 1946, will be received as the next one. That is the northeast corner.

The Clerk: Plaintiff's Exhibit 68 in evidence.

The Court: And the last one, which is a portion of the summary of November, 1946, that is the upper part of the page.

The Clerk: It is Plaintiff's Exhibit 69 in evidence.

Mr. E. B. Stanton: I do not know, for the record, whether I made the formal statement of offering them.

The Court: I have already received them. I presumed you offered them, and the portions boxed will be transcribed into the record.

(Plaintiff's Exhibits 64, 65, 66, 67, 68, and 69 read in words and figures as follows:) [733]

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT 64

Resumen Mensual de Exportacion de Frutos del Pais de la Rep. Arg.—JUNIO 1946 No. 25

Glucosa: miles de ks	U. S. A.	Irlanda	Suiza	Palestina	Peru	Venezuela	Totales JUNIO	De enero a 30 Jun. 46
Engenio Lang SRL.	59.7	—	81.6	50.6	—	—	191.9	1064.8
Crawford Keen & Co.	54.2	—	—	—	—	—	54.2	884.3
Sifar S. A.	—	—	10.7	—	12.7	—	23.4	634.9
Pablo Hadra & Cia.	—	249.9	53.2	—	—	—	294.1	615.9
Hirschberg S. A.	—	129.6	—	—	—	—	129.6	206.5
Sunney S. A.	—	—	—	—	—	—	—	162.9
J. Llop.	—	—	—	—	—	—	—	160.4
Bunge & Born	—	—	—	—	4.2	—	4.2	143.6
Auge Freres & Cia.	—	—	—	—	—	—	—	133.0
Tricontinenta SRL.	—	—	32.4	—	—	—	32.4	130.4
Irveco S. A.	—	—	—	—	—	—	—	119.8
A. Taubevischlag	54.2	—	—	—	—	—	54.2	108.5
R. Lili Galdenos	—	—	—	—	—	—	—	65.5
Engadina SRL	—	—	—	—	—	—	—	65.1
Dicomex SRL	—	—	—	—	—	—	—	54.9
Cont. Commoditis Arg.	54.4	—	—	—	—	—	54.4	54.4
La Plata Cereal Co.	—	—	—	—	—	—	—	54.3
Productiva SRL	—	—	—	—	—	—	—	54.3
M. Comero & Cia	—	—	—	—	—	—	—	54.1
F. C. Pedemonte	—	—	—	—	—	—	—	53.8
J. Coumantaros	—	—	—	—	—	—	—	43.6
Sudametal S. A.	—	—	—	—	—	—	—	32.5
Vegetolio Argent.	—	—	—	—	—	—	—	27.8
A. K. Hallo	—	—	—	—	—	—	—	27.7
Refineria de Maiz.	—	—	—	—	—	—	—	3.9
Quebracho Arg. SRL	—	—	—	—	—	—	—	3.2
Iudamtox SRL	—	—	—	—	—	3.2	3.2	3.2
	222.5	370.5	117.9	50.6	16.9	3.2	841.6	4957.2

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 65

Resumen Mensual de Export de Frutos del Pais de la Rep. Arg.

JULIO de 1946

Glucosa miles de kilos	Canada	Belgica	Total Julio	De enero a 31 jul. 946
Eug. Lang SRL	—	—	—	1064.8
Crawford Keen & Co.	54.2	—	54.2	938.5
Pablo Hadra Ltd.	—	54.2	54.2	670.1
Sifar SA	—	—	—	634.9
Hirschberg SA.	—	—	—	206.5
Sonney SA	—	—	—	162.9
J. Llop	—	—	—	160.4
Bunge & Born	—	—	—	143.6
Auge Freres & Co.	—	—	—	133.0
Tricontinenta SRL	—	—	—	130.4
IWECO SA	—	—	—	119.8
A. Taubenschlag	—	—	—	108.5
R. Lili Galdenos	—	—	—	65.5
Engadina SRL	—	—	—	65.1
Dicomex SRL	—	—	—	54.9
Cont. Commoditis Arg	—	—	—	54.4
LaPlata Cereal Co	—	—	—	54.3
Productiva SRL	—	—	—	54.2
M. Comero & Co	—	—	—	54.1
F. C. Pedemente	—	—	—	53.8
J. Coumantaros SRL	—	—	—	43.6
Sudametal SA	—	—	—	32.5
Vegetolio Argentino	—	—	—	27.8
Algolan SRL	26.8	—	26.8	26.8
A. K. Halle	—	—	—	21.7
Refineria do Maiz.	—	—	—	3.9
Quebracho Arg. SRL	—	—	—	3.2
Sudamtex SRL	—	—	—	3.2
	81.0	54.2	135.2	5092.4

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 66

Glucosa : miles de ks	Irlanda	Suiza	U. S. A.	Totales— AGOSTO	De 1° enero a 31 Agosto 46
Sifar S. A.	775.9	—	—	775.9	1410.8
Eugenio Lang SRL	—	21.8	43.9	75.7	1130.5
Crawford Keen & Cia	—	—	—	—	938.5
Pablo Hadra & Cia	—	84.0	—	84.0	754.1
Hirschberg S. A.	140.5	—	—	140.5	347.0
Sunney S. A.	—	—	—	—	152.9
J. Llop	—	—	—	—	160.4
Bunge & Born	—	—	—	—	143.6
Auge Freres & Cia	—	—	—	—	133.0
Tricontinenta SRL	—	—	—	—	130.4
IWECO S. A.	—	—	—	—	119.8
A. Taubenschlag	—	—	—	—	108.5
R. Lili Goldanos	—	—	—	—	65.5
Engadina SRL	—	—	—	—	65.1
Dicomex SRL	—	—	—	—	54.9
Cont. Commoditis Arg.	—	—	—	—	54.4
La Plata Cereal Co.	—	—	—	—	54.3
Productiva SRL	—	—	—	—	54.2
M. Comero & Cia	—	—	—	—	54.1
F. C. Pedemonte	—	—	—	—	53.8
J. Coumantarros & Cia.	—	—	—	—	43.6
Sudametal S. A.	—	—	—	—	32.5
Vegetolio Argentino	—	—	—	—	27.8
Algolan SRL	—	—	—	—	26.8
A. K. Halle	—	—	—	—	21.7
Refinerfa de Maiz	—	—	—	—	3.9
Quebracho Arg. SRL	—	—	—	—	3.2
Sudamtex SRL	—	—	—	—	3.2
	916.4	105.8	43.9	1066.1	6158.5

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 67

Glucosa: miles de ks	USA	Total Setb.	De enero a 30 Set. 46
SIFAR S. A.	—	—	1410.8
Eug. Lang SRL	178.5	178.5	1309.0
Crawford Keen & Co.	—	—	938.5
Pablo Hadra Ltd.	—	—	754.1
Hirschberg SA	—	—	347.0
Sonny SA	—	—	162.9
J. Llop	—	—	160.4
Bunge & Born	—	—	143.6
Auge Freres & Co.	—	—	133.0
Tricontinenta SRL	—	—	130.4
IWECO SA.	—	—	119.8
A. Taubenschlag	—	—	108.5
R. Lili Galdanos	—	—	65.5
Engadina SRL	—	—	65.1
Dicomex SRL	—	—	54.9
Cont. Commoditis Arg	—	—	54.4
La Plata Cereal Co	—	—	54.3
Productiva SRL	—	—	54.2
M. Comero & Co.	—	—	54.1
F. C. Pedemonte	—	—	53.8
J. Coumantaros SRL	—	—	43.6
Sudametal SA	—	—	32.5
Vegetolio Arg. SRL	—	—	27.8
Algolan SRL	—	—	26.8
A. K. Halle	—	—	21.7
Refineria de Maiz	—	—	3.9
Quebracho Arg. SRL.	—	—	3.2
Sudamtex SRL	—	—	3.2
	178.5	178.5	6337.0

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 68

Glucosa : miles de ks	Suiza	Haifa	Total Octub.	De enero a 31 Oct. 46
Sifar S. A.	—	—	—	1410.8
Eug. Lang SRL	—	52.6	52.6	1361.6
Crawford Keen Ltd.	—	—	—	938.5
Pablo Hadra & Cia	54.6	—	54.6	808.7
Hirschberg S. A.	—	—	—	347.0
Sonny S. A.	—	—	—	162.9
J. Llop	—	—	—	160.4
Bunge & Born	—	—	—	143.6
Auge Freres & Cia	—	—	—	133.0
Tricontinenta SRL	—	—	—	130.4
IWECO S. A.	—	—	—	119.8
A. Taubenschlag	—	—	—	108.5
R. de Lili Galdano	—	—	—	65.5
Engadina SRL	—	—	—	65.1
Dicomex SRL	—	—	—	54.9
Cont. Commoditis A	—	—	—	54.4
La Plata Cereal C	—	—	—	54.3
Productiva SRL	—	—	—	54.2
M. Comero & Cia.	—	—	—	54.1
F. C. Pedemonte	—	—	—	53.8
J. Coumantaros & c.	—	—	—	43.6
Sudametal S. A.	—	—	—	32.5
Vegetolio Arg. SRL	—	—	—	25.8
Algolan SRL	—	—	—	26.8
A. K. Halle	—	—	—	21.7
Refiner. de Maiz	—	—	—	3.9
Quebracho Arg. SRL	—	—	—	3.2
Sudamtex SRL	—	—	—	3.2
	54.6	52.6	107.2	6444.2

(Testimony of G. Fred Berger.)

PLAINTIFF'S EXHIBIT No. 69—(Continued)

Glucosa; miles de ks	USA	China	Irlanda	Venezuela	Peru	Sulza	S. Africa	Totales	Del 1° enero a 30 Nov. 46
Dicomex SRL	—	—	—	—	—	—	—	—	54.9
Cent. Commoditis A	—	—	—	—	—	—	—	—	54.4
La Plata Cereal C.	—	—	—	—	—	—	—	—	54.3
Productiva SRL	—	—	—	—	—	—	—	—	54.2
M. Comeró & Cia.	—	—	—	—	—	—	—	—	54.1
F. C. Pedemonto	—	—	—	—	—	—	—	—	53.8
J. Coumantaros & Cia.	—	—	—	—	—	—	—	—	43.6
Sudametal S. A.	—	—	—	—	—	—	—	—	32.5
Irsa S. A.	—	33.3	—	—	—	—	—	33.3	33.3
Vegetolio Arg. SRL	—	—	—	—	—	—	—	—	27.8
Algolan SRL	—	—	—	—	—	—	—	—	26.8
A. K. Halle	—	—	—	—	—	—	—	—	21.7
J. Siccardi	—	—	—	—	9.8	—	—	9.8	9.8
J. C. Basombio	—	—	—	—	5.6	—	—	5.6	5.6
S. Wolff	—	—	—	—	5.2	—	—	5.2	5.2
Refiner de Maiz	—	—	—	—	—	—	—	—	3.9
Quebrach Arg. SRL	—	—	—	—	—	—	—	—	3.2
Sudamtex SRL	—	—	—	—	—	—	—	—	3.2
	352.5	335.8	135.9	111.6	102.1	43.5	15.4	1096.8	7541.0

(Testimony of G. Fred Berger.)

Q. (By Mr. E. B. Stanton): Now, Mr. Berger, calling your attention to this first exhibit, Plaintiff's Exhibit 64, June, 1946, to the part enclosed in the red box, the column on the left indicates what?

A. Indicates the exporters.

Q. And the first column "U.S.A." indicates what?

A. Those amounts shipped——

Mr. Bronson: I think the record is the best evidence, if your Honor please. It is interpolation. If it does not say that, then it is his addition.

Mr. E. B. Stanton: Well, the names.

Mr. Bronson: I make an objection to the document being——

The Court: Gentlemen, there is no use of taking time. We know Spanish just as well as Mr. Berger. We probably can translate better because we read it, too. I mean all of us combined here. So there is no use to have him interpret for us because this speaks for itself.

The first column says "Glucose." I will put it into the record and see if it is not a correct summary. The title of each of these, taking the title of the first exhibit 64, is "Monthly summary of exports of fruits from the Republic of Argentina." They say "from the country of the Republic," "del Pais," et cetera. "June, 1946, No. 25."

The first column says "Glucose:—thousands of kilos." [747] Then the next column is "U.S.A.—Ireland—Switzerland—Palestine — Peru — Venezuela." Then follows "Total for June," and the

(Testimony of G. Fred Berger.)

last column is "from January to 30th of June, 1946."

Then under the first column "Glucosa:—" is a list of the dealers or persons. We will take one. And then along the second line at the top, under the proper rubric, shows "Destination of export."

We will take one which seems to have the largest number of figures on the list. "Eugenio Lang S.R.L." under "U.S.A." they have "59,7"; under "Ireland" they have nothing; under "Switzerland" they have "81,6"; under "Palestine" they have "59,6"; under Peru they have nothing; under "Venezuela" they have nothing; under "Total" they have "June—191,9;" under the last rubric "from January to 30th of June, 1946" they have "1064,8."

Some of them have nothing. We will take the next one, No. 4 down the line, because it has larger amounts. It is "Pablo Hadra & Cia." On the United States, the United States is blank; "Ireland—240,9;" "Switzerland"—53,2; "Palestine" nothing; "Peru" nothing; "Venezuela" nothing; "Totals for June 294,1;" "Total from January to 30th of June '46—615,9," and the others are smaller. That is the legend. I think that ought to suffice without any further interpretation.

Mr. E. B. Stanton: I think that is all. If the court [748] please, it is possible we may wish to put Mr. Whipple on, if we could have our morning recess.

The Court: You have not finished with this witness yet.

(Testimony of G. Fred Berger.)

Mr. E. B. Stanton: I have finished with this witness.

The Court: I know, but counsel has not.

Mr. E. B. Stanton: I am sorry.

The Court: Counsel has not, and I want to finish with the witness.

Cross-Examination

By Mr. Bronson:

Q. With respect to that three-way telephone call of which you fixed the date as approximately July 12th, you and Mr. Dichter in South America, and Mr. Metcalf in the United States, did you read the deposition of Mr. Metcalf on that subject? A. Yes, sir.

Q. I won't read it to refresh your mind. Going back——

The Court: Where are you reading from?

Mr. Bronson: Mr. Metcalf's deposition.

The Court: I know, I have it. What page?

Mr. Bronson: Page 28.

The Court: What line?

Mr. Bronson: They are not numbered. It is right in [749] the middle of the page.

The Court: Oh, I forgot these New York reporters. This is a New York reporter, isn't it? That is right. I don't understand why a metropolitan area like that should have this system. We have a lot of trouble. We try a lot of patent cases and trade mark cases and we have al-

(Testimony of G. Fred Berger.)

ways the same trouble. I do not know why they do not require them to number their pages.

(Discussion between court and the reporter off the record.)

The Court: Give me the place again.

Mr. Bronson: "Going back to the cable that I read" in the middle of page 28.

The Court: "Going back to the cable," all right; that is where he is reading.

Q. (By Mr. Bronson): "Going back to the cable that I read to you signed 'Engraw Dichter Berger,' under date of July 8, 1946, did you have a telephone conversation jointly with Mr. Dichter and Mr. Berger in which you stated that you were satisfied to leave the question of liquidation or cancellation in their hands together with Dr. Goytia, who then represented Schenley in Argentina?"

"The answer is no.

"Q. You did not?"

"A. No, I had no authority to, and if I had, the thing [750] would probably have been liquidated in accordance with——

"Q. In accordance with what?"

"A. With their judgment, because that was what they asked us to do, to rely on their judgment to liquidate this thing."

Now, having read that, is it your statement that Mr. Metcalf incorrectly answered that when he said "no"?

A. It is definitely my statement.

(Testimony of G. Fred Berger.)

Mr. Bronson: All right. That is all, Mr. Berger.

The Court: All right, you may step down. We will take a short recess and then we will hear any further testimony, and then I will make the proper arrangements for the remainder of the depositions.

(Short recess.) [751]

The Court: All right, gentlemen.

Mr. E. B. Stanton: The plaintiff will now introduce, by stipulation of counsel, a telephone bill to Mutual 4371, which is the telephone number of Harold Whipple Company, bearing a record of toll charges to that telephone from May 10th, 1946, through June 5th the same year. For the purpose of the record, the only calls that have any bearing on the case are the calls reported to San Francisco from May 20th through June 5th, and it is further stipulated that all such calls were made by Mr. Whipple to the Schenley Corporation in pursuance of the transaction involved in this case.

Mr. Bronson: It is so stipulated.

The Clerk: Admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 70 in evidence.

Mr. E. B. Stanton: Now, your Honor, the plaintiff rests.

(Whereupon the plaintiff rested its case.)

Mr. Bronson: We have rested, except for the additional testimony coming from South America.

The Court: All right, gentlemen.

Mr. Bronson: But before doing so, I have this matter stipulated to——

Mr. E. B. Stanton: Oh, yes.

Mr. Bronson: ——explanatory of the plaintiff's introduction in the testimony of a conversation between Mr. [752] Whipple and Mr. Baglin, I read by agreement of counsel a short excerpt of a deposition of Mr. Whipple taken in Los Angeles on July 1st, 1947, at page 16, between lines 6 and 15, reading in this wise:

“A. I would like to interrupt here to interpolate that, in hearing this testimony, that we are talking about a series of telephone conversations that occurred, a number of them, backwards and forwards, over a period of several days, and several exchanges, of course, on my part, of cablegrams with my principals and I will not be held to the accuracy, of the exact date or of the sequence of the telephone calls between the San Francisco office of Schenley and myself, nor to the exact principals, whether it was Mr. Baglin or Mr. Donnelly with whom I talked following the first conversation.”

That ends it.

Mr. E. B. Stanton: There does remain as part of the plaintiff's case the testimony, as we stated yesterday, of Juan Lang, who will be available in Los Angeles on the 9th of June, having to come up from South America. The defendant's counsel have agreed to have his testimony either in court or by way of deposition, whichever the Court would

suggest on that matter, and it is understood that his testimony is to be by way of rebuttal. And I further understood the Court to state, in view of what we claim as the surprise [753] of these depositions, that after the arrival of the further South American depositions of the defendant, that upon petition to the Court, that he would give us the opportunity of further rebuttal evidence by deposition.

The Court: Just one minute. Just a minute.

Now, gentlemen, is the date of the arrival of this gentleman certain?

Mr. E. B. Stanton: I have a telegram which I will show the Court, which I received from him.

(Mr. E. B. Stanton hands telegram to the Court.)

The Court: Just a minute. I have to consult my calendar. In view of the fact that there are so many depositions and, gentlemen, our eyes take a terrible beating, as you all know, and the reading of depositions is a task and we can't take time off—and I always rely upon week ends; in fact, as a rule, I do not hold court on Saturday and even that does not always apply, because one of us has to be here on Saturday, because we never leave this District without someone being present to take care of emergency matters—and there is a large number of depositions here, I think it would be much more satisfactory, as long as the gentleman is here, if it is conducted in open court.

Mr. E. B. Stanton: All right.

The Court: The man speaks English, or will you need an interpreter, do you know? [754]

Mr. L. B. Stanton: He speaks English.

Mr. E. B. Stanton: He speaks English, yes.

The Court: Suppose we set it for 2:00 o'clock Wednesday afternoon. He does not give the hour of his arrival. Then if I am in the midst of a trial, I will merely give counsel the afternoon off. I have cases that will probably be tried.

Mr. E. B. Stanton: I do not anticipate that his testimony should take in excess of half or three-quarters of an hour for the direct and cross examination.

The Court: Well, if you want to come in later in the afternoon, I will make it 3:00 o'clock. I don't care. You know I don't look at the clock.

Mr. E. B. Stanton: Yes. Well, 3:00 o'clock or 2:00 o'clock.

The Court: Whatever counsel say.

Mr. Bronson: It is agreeable to us at either hour on that day.

The Court: Let us make it 3:00 o'clock, then.

Mr. Bronson: All right.

The Court: And if I am in the midst of a trial, I can go ahead from 1:00 o'clock to 3:00 o'clock and then probably conclude the matter or give counsel the benefit of the hour.

Then, the further proceedings in the matter will be continued until Wednesday, the 9th of June, at the hour of 3:00 o'clock p. m.

I will not make any order at the present time about the waiting time for the other depositions in time for argument. We will see. Perhaps they will arrive before that time. [755]

Mr. L. B. Stanton: I doubt it, your Honor, because I understand they haven't been taken yet.

The Court: They haven't been taken yet?

Mr. Bronson: Well, that is the suggestion from the information that we had, that they would arrive——

Mr. L. B. Stanton: You see, on those depositions that have to arrive at a time convenient for the Argentine court to hear them.

The Court: Well, being Latin Americans, they don't have this "drive" that we have. They take their lives leisurely.

Mr. L. B. Stanton: I understand, at the same time they do have to get some time to get in on it, in court.

The Court: That is not a criticism. That is an admiration of philosophy, if a person can practice that kind of living. I have always said I could enjoin leisure in several languages. From what I learn about counsel in this case, I think they could enjoin leisure in several languages, also, but we don't get much of it.

But, gentlemen, at any rate, let us not agree at the present time. We will wait and see and we will again talk things over. I will tell you what my suggestion is: I have already indicated to you that unless the entire testimony is complete this month, there won't be a likelihood of the matter coming to a close soon, unless I declare this an emergency matter and set it for some time in July and interrupt my work up there in the Northern District

of California. I have referred several times to the fact that way back in March or in February of this year I promised Judge Roche the senior judge of the Northern District, that I would spend the month of July up there, presumably trying another antitrust case, but even if that antitrust case is continued for some reason, although I have heard it is actually set for the 6th of July, I have agreed nonetheless to assist them during that month, because they are one judge short—and if you have read a recent decision of the Supreme Court, that came out last week on habeas corpus, where they say we can't deject a habeas corpus application, even if it is made a fourth or fifth or sixth time, if the man strikes upon a new point and just states that he has a new point, I think they will probably need one or two more judges up there, due to the number of habeas corpus proceedings they have to handle there. It is a problem that can't be met. They tried to meet it in some way and the Supreme Court did not approve of it, at least five of the judges didn't. And so they need assistance and I am always glad to help them, because they help not specifically me, but the court of which I am a member. I never ask to trade work when I go somewhere else. I never ask anyone to come down here and take my place, but situations have arisen where we need assistance and they have come here, and so have other judges of the Ninth Circuit. Their business is our business and we have agreed to help them whenever they call on us. [758]

However, my thought is to trail this not later

than the last day of June until some Monday, when it could be completed and then by that time, if it isn't, then we will determine at that time what to do. I don't want to lock this case up. If I take into consideration the time I will spend in San Francisco, assuming that the case doesn't last longer than a month, and counsel have already frightened me by saying that it might, because it is a civil antitrust case involving damages, and of course I don't even know whether it is a jury case or a non-jury—the counsel in the other case I just finished, before I started this, seem to know more about it because some of their San Francisco associates are in that case also—so even if I don't finish that, our vacation month is always August, and I think you heard me say that as long as our judicial conference this year is to be held in Seattle and the American Bar Association meeting follows us, I thought that I would, for the first time in my life after 20 years' membership in the American Bar Association, attend a meeting away from home—the only one which I attended was many years ago when they met in Los Angeles—which means that I will not be back for trial work until the middle of September. And I don't want to lock this case up for that length of time. So I am leaving it flexible to determine, not exactly from day to day, as between next week and the end of the month what we are going to do. In the meantime, I would suggest to counsel that they urge their correspondents to endeavor to secure the taking of the depositions as soon as possible.

Mr. Bronson: We will do that. We will do that.

The Court: And if you have some idea when they will be here, I would be willing to arrange to break the work there and take some week end and come down here, either some end of the week, on Friday, or some Monday, and take care of the matter, because when I am up there I hold court five days instead of four, because I have no calendar there. Of course, that Monday calendar is not always observed. We have court on Mondays. On this last Monday I merely found out that there were no law and motion matters of importance and I made arrangements to get rid of them. I am merely telling you that so that you will know the situation.

In the meantime I will try to bring myself up to date with the depositions that are in the record.

I have already made the order continuing further proceedings and the rest of it was merely the expression of my views as to the possibilities, so that you will know what I have in mind and to suit your own convenience and the desires of you all and my desire that we, having started this case, complete it as quickly as possible. And the time, I will fix, for the additional testimony and of course also time for oral argument that you gentlemen present. I prefer oral argument and if at the conclusion of the oral argument, some question arises on which I feel briefs should be filed, I will determine that at the time.

I think that an oral argument, particularly citation of authorities, whether you give me a list of them or have it transcribed, serves all practical purposes, and for one reason, as I have always said, that I can't ask questions of a cold brief, but I can ask questions of counsel who makes an oral argument so as to clarify my own thoughts and give them an opportunity to correct me if I have any misapprehension of the facts or of the law which is applicable.

So with that understanding, gentlemen, the Court will recess.

I will return this telegram to you, Mr. Stanton.
Mr. E. B. Stanton: Thank you.

(And thereupon, at the hour of 12:00 o'clock noon on Friday, June 4, 1948, the further hearing of said action was continued until Wednesday, June 9, 1948, at the hour of 3:00 o'clock p.m.) [761]

PLAINTIFF'S EXHIBIT 61

In the District Court of the United States for
the Southern District of California, Central
Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

Plaintiff's Exhibit 61—(Continued)
(Deposition of Horacio Beccar Varela.)

INTERROGATORIES

Deposition of Horacio Beccar Varela (Hijo), taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 10 a. m. on November 26, 1947, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Horacio Beccar Varela, did well understand the English language, I, Jones R. Trowbridge, Consul of the United States, who also well understand the said language, administered the oath and the interrogatories were put to him in the English language.

The answers of the witness, Horacio Beccar Varela, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Horacio Beccar Varela, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Horacio Beccar Varela of Pena 2366, Buenos

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

Aires, Argentina, lawyer, 40 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories now to be put to you. So help you God.”

deposes and says:

Answers by Horacio Beccar Varela
To Interrogatories

To the First Interrogatory, he says:

My name is Horacio Beccar Varela (Hijo), 40 years of age. Residence: Pena 2366, Buenos Aires, Argentina. Occupation: Lawyer.

To the Second Interrogatory, he says:

I have been a lawyer since 1929 and I have practiced my profession in the City of Buenos Aires in general practice attending matters of all kind related to the law. I belong to the law office called Estudio Beccar Varela, which was founded by my father in the year 1897, which has offices in Bartolome Mitre 430, Buenos Aires, Argentina.

To the Third Interrogatory, he says:

I attended the primary school and secondary school at the Colegio Marin in the City of San Isidro, Province of Buenos Aires; then I attended the law school at the University of Buenos Aires, where I obtained my degree as a lawyer, in August, 1929. I was admitted to the Bar shortly afterwards. I have never held, nor hold at present any gov-

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

ernment position, and in the practice of my profession I have acted as lawyer for the National City Bank of New York since 1930 and have also advised and intervened in law cases for many other American, English and Argentine firms, engaged in commerce, or with industries established in this country. I have also had a considerable experience in international trade due to my intervention in matters related thereto and interesting some of my clients, including sales of personal property to firms abroad, such as for instance those made by the Frigorifico Anglo (Anglo Meat Packing Company) and other exporters.

To the Fourth Interrogatory, he says:

Law No. 12,591 and No. 12,830 (incorrectly stated in the interrogatory as Law No. 12,831, as said law No. 12,831 does not refer to the subject matter of this interrogatory), were approved by the National Congress and promulgated respectively under dates of September 8, 1939, and August 23, 1946; law No. 15,591 does not exist, as the last numbers of the laws enacted up to the present are between 13,000 and 13,100. I attach as Exhibit "A" a copy of law No. 12,591, and as Exhibit "B" the copy of law No. 12,830. These two laws were published in the Official Bulletin issued daily by the government, respectively under dates September 11, 1939, and September 16, 1946, which in accordance with numerous decisions of our Courts is considered the official publication and the true text of all laws

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

sanctioned by the Argentine Congress. In this connection I quote the authority of the Annotated Civil Code published by Dr. Busso, page 16. I cannot attach at this moment a copy of the respective issues of the Boletin Oficial, because upon inquiry I found that they are exhausted. I have not been able either to obtain the attestation of the attached copies by any government official. As regards the regulations and orders passed and made under the above-mentioned laws No. 12,591 and No. 12,830 there are so many that have been issued at different times without publication in the Official Bulletin, that to obtain a full set of copies thereof would be a very difficult and lengthy task. I may say, however, that no one of those decrees, regulations and/or orders, except those which I will mention later on, refers to the export of glucose. As laws No. 12,591 and No. 12,830 have as principal object to establish a system of maximum prices for consumer articles and they provide for an enumeration of the articles to be included to be made by Executive Power, the latter has issued most of the decrees relating to these laws to fix the maximum prices for sale of all kinds of articles, food stuffs, drinks, home appliances, etc., but it has not done so with regard to glucose. On the other hand, article 14 of law No. 12,591 and article 2, paragraph 4 of law No. 12,830 authorize the Executive Power to limit or prohibit entirely the export of certain commodities as required by the needs of

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

the country. In the exercise of this faculty the Executive Power has from time to time issued decrees or regulations with regard to many raw materials and finished products, but no one of them refers to glucose. I shall mention later in this deposition some regulations of the Secretary of Industry and Commerce which specifically refer to glucose permitting its exportation under conditions which do not imply any prohibition or restriction. As to the dates when each of the above laws went into effect in accordance with the provision of article 2 of our Civil Code, (as currently interpreted by our Courts, see: decision of the First Civil Court of Appeals of September 4, 1933, 43 J. A. (Jurisprudencia Argentina) 543; 2nd Civil Court of Appeals, September 27, 1933, 108 Gaceta del Foro 203), said date is that of the respective publication. Law No. 12,591 was in force therefore as from September 11, 1939, until the date of publication of law No. 12,830, which by virtue of its article 19 repealed and substituted entirely the previous one. Law No. 12,830 is in force as from September 16, 1946, and in accordance with what is stated in article 19 thereof shall be so in force until June 3, 1952.

To the Fifth Interrogatory, he says:

As mentioned, I have found no legal provision, regulation or order prohibiting the export of glucose during the year 1946 or during this 1947. The export of all kinds of products is currently subject

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

to the obtention of an administrative permit from the Secretary of Industry and Commerce and with regard to glucose two regulations were issued by this Secretary concerning the conditions upon which said permits would be granted. Under date of August 29, 1946, a resolution No. 6926/46 was issued stating the total quantities of glucose that may be exported and establishing certain conditions to be fulfilled in the application for the respective export permits. A few weeks later this resolution was repealed and replaced by resolution No. 7499/46 issued on September 12, 1946, by virtue of which, in view of the change occurred in the situation of the glucose market, where it was verified that production had increased considerably while consumption only very slightly, the maximum limit fixed for exports in the previous resolution was annulled and free exports were permitted after the local needs had been fulfilled. I attach copies of the two resolutions of the Secretariat of Industry and Commerce which I have mentioned in the answer to interrogatory No. 5, marked respectively "C" and "D."

To the Sixth Interrogatory, he says:

I have not found any interpretation of the laws and regulations with respect to export licenses made by any of the Courts, executive or administrative offices of the Argentine Republic relative to the grant or procurement of said export licenses during the period of this contract, except the resolutions

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

of the Secretariat of Industry and Commerce which I have mentioned in my answer to interrogatory No. 5.

To the Seventh Interrogatory, he says:

This question does not require an answer in view of my answer to interrogatory No. 6.

To the Eighth Interrogatory, he says:

In my opinion, under Argentine law, the purchase contract covered by a letter copied in Exhibit "A," which I have examined, is perfectly valid both as to its form and as to the provisions it contains. As a private contract, by virtue of article 1012 and et seq. of the Civil Code, as well as articles 1144 and 1147 of the same Code, an agreement in writing accepting a proposal of sale, as that which is contained in the document in question, is valid and binding on both parties to it. Mention may be made also of article 207 and article 208 of the Code of Commerce which make specifically applicable to commercial matters the above-mentioned provisions of the Civil Code. The conventions contained in the document in question furthermore do not fall within the prohibitions of article 499 of the Civil Code concerning obligations assumed without a proper cause or consideration, neither within article 502 of the same Code which declares null and void obligations or undertakings contrary to the laws or to the public order. There has not been in this case as explained, any force

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

mayeur such as would exempt the parties from complying with their obligations under the provision of article 513 of our Civil Code. No practical impossibility to export the glucose or to pay its price existed that I know of; no legal prohibition existed either, as has been explained here above. In this latter connection it may be mentioned that our Courts have declared in several cases that prohibitions to export are not per se to be considered as constituting a force mayeur, unless directly related to the merchandise which is the object of the contract (Commercial Court of Appeals of the Federal Capital, *Gaceta del Foro*, volume 29, page 5; volume 24, page 314). In the case under consideration, in which a F.O.B. sale had been agreed, the seller was supposed to obtain whatever export permits may have been necessary and place the merchandise on board the carrying vessel. As there was no legal objection to obtaining such export permit I am of the opinion that the Plaintiffs were able to comply with their obligations under the contract with the Defendants at the times therein specified. Our laws do not specifically deal with the C.I.F., F.O.B. and F.A.S. clauses, but our Courts have had many opportunities to examine them and give to them the value and purport generally accepted in business practice in this country and universally, on the basis of which I have made the foregoing statement. See in this respect decisions of the Commercial Court of Appeals, published in *J. A. (Jur-*

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

isprudencia Argentina) volume 26, page 303 and volume 29, page 773.

To the Ninth Interrogatory, he says:

I believe I have given already the reasons for my answer to interrogatory No. 8 and quoted the decisions of the Argentine Courts related thereto.

To the Tenth Interrogatory, he says:

In Argentina a law is passed by the National Congress or by the State Legislatures, then promulgated by the respective Executive Power and published, which makes it obligatory for all inhabitants. A decree is issued by the Executive Power either National or of a Province (States) for the purpose of applying, interpreting or regulating the application of a law. A resolution or order may be issued by any of the departments that compose the Executive Power, sometimes called Ministries, sometimes Secretariats. This opinion is based on my knowledge of the Argentine Constitution and the laws issued thereunder providing for the way in which the Executive Power functions. As regards the provincial laws and decrees, similar constitutional provisions and laws apply in the case of each province.

To the Eleventh Interrogatory, he says:

By virtue of the provision of article 67, paragraph 2 of our Constitution, decrees, regulations or orders of the Executive Power must never contradict any provision of a law or go beyond what

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

said law permits. Under article 31 of the same Constitution, the provisions of the Constitution and of the laws sanctioned thereunder shall prevail in case of conflict with any provision of a Provincial Constitution or laws or in any other case of a similar nature. Our Courts have in innumerable cases declared null and void decrees and resolutions of the Executive Power that under the pretext of interpretation or clarification of the law modified its provisions. See among others: Decision of the National Supreme Court, published in *Jurisprudencia Argentina* 1945, volume 1, page 271; Federal Court of the Federal Capital, in *Jurisprudencia Argentina* 1944, volume 2, page 396; Second Civil Court of Appeals of the Federal Capital, *Jurisprudencia* 1945, volume 3, page 424, etc.

To the Twelfth Interrogatory, he says:

Existence of the telegram mentioned in this interrogatory does not alter the opinions given by me hereto, for as in accordance with article 1150 of our Civil Code offers can only be withdrawn when they have not yet been accepted, and article 1154 of the same Code states that once the acceptance to an offer has been sent to the other party, the deal is closed. Articles 1197 and 1198 of the Civil Code state that the obligations and agreements contained in a contract are for the parties thereof a rule to which they must adhere as to the law itself. This applies to purchase and sale con-

Plaintiff's Exhibit 61—(Continued)

(Deposition of Horacio Beccar Varela.)

tracts as well as all others, by virtue of article 1323 et seq. of the Civil Code, also applicable to commercial matters as per the provision of articles 207 and 208 of the Code of Commerce, which I have mentioned above. Article 1200 of the Civil Code permits both parties to the contract to cancel it by mutual agreement, but lacking the consent of the other party no one of them can decide such cancellation. Among many cases decided by our Courts which have reaffirmed these principles, I can quote two of the first Civil Court of Appeals, published in *Jurisprudencia Argentina* volume 1, page 381, and volume 24, page 919; also two of the National Supreme Court, published in *Jurisprudencia* volume 5, page 491, and volume 28, page 310.

To the Thirteenth Interrogatory, he says:

I believe I have given already the reasons for my answer to interrogatory No. 12 and quoted the decisions of the Argentine Courts relating thereto.

/s/ H. BECCAR VARELA

HORACIO BECCAR VARELA,
Witness.

/s/ JONES R. TROWBRIDGE,

Consul of the United States
of America.

(Exhibits "A," "B," "C," and "D," attached to the foregoing testimony of Horacio Beccar Varela, being in Spanish, have not been copied.)

PLAINTIFF'S EXHIBIT 62

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a Corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

Defendants.

INTERROGATORIES

Deposition of Alberto Padilla, taken before me, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, at 3:30 p.m. on November 26, 1947, under authority and by virtue of a commission issued out of the District Court of the Southern District of California, Central Division, in the above-entitled cause.

It appearing that the witness, Alberto Padilla, could not intelligently testify in the English language, one Constantino Ramos, of Avda. R. Saenz Pena 760, Buenos Aires, who also well understands the Spanish and English languages, was employed as interpreter and was sworn in as follows:

“You do solemnly swear that you know the English and the Spanish languages and that you will truly and impartially interpret the oath to be administered and interrogatories to be asked Alberto Padilla, a witness, now to be examined, out of the

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

English into the Spanish language, and that you will truly and impartially interpret the answers of the said Alberto Padilla and reto out of the Spanish language into the English language. So help you God.”

and said Constantino Ramos interpreted accordingly.

The answers of the witness, Alberto Padilla, to said interrogatories were taken down stenographically by Hella J. de Irniger, of Santa Rosa 2418, Florida F.C.C.A., who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Alberto Padilla, a witness, now to be examined. So help you God.”

The notes were then forthwith transcribed by her under my direction and the said transcript being then read over correctly to the said witness by me was then signed by the said witness in my presence.

Alberto Padilla, of Avda. R. Saenz Pena 760, Buenos Aires, Argentina, lawyer, 48 years of age, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories [776] now to be put to you. So help you God.”

deposes and says:

Answers by Alberto Padilla to Interrogatories

To the First Interrogatory, he says:

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

My name is Alberto Padilla, 48 years of age. Residence: Avda. R. Saenz Pena 760. Occupation: Lawyer.

To the Second Interrogatory, he says:

I have been practising my profession as a lawyer since 1940 in Buenos Aires. I am a lawyer for the First National Bank of Boston and many other commercial institutions.

To the Third Interrogatory, he says:

I have graduated as doctor in jurisprudence of the National University of Buenos Aires. I have been admitted to practice by the Court since April 1920. I have been a professor of the law school until 1946. I have been a director of the Instituto Movilizador de Inversiones Bancarias, an official agency created jointly with the Central Bank at the same time for the liquidation of banking assets.

To the Fourth Interrogatory, he says:

Statute No. 12,591 was promulgated on September 8, 1939. Article 14 authorizes the Executive Power "to restrict or prohibit the export of merchandise when the needs of the country so require and for the purposes of the present statute." The statute did not establish its term of [777] expiration, but was temporary because it is an emergency statute. (Article 19.) Article 14 of the statute No. 12,591 authorizes the Executive Power to prohibit or restrict exportation of the articles referred to in this statute. Decree No. 16,216 of June 3, 1946, added

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

to the article 14 of the statute No. 12,591, the penalties to be applied for violation of this article and also says that "the Secretaria de Industria y Comercio will regulate the conditions of applications of the present article, applying meanwhile the regulations in force." Statute No. 12,830 (incorrectly stated in interrogatory No. 12,831) was promulgated on August 23, 1946, to be in force until 1952. Its article 2 authorizes the Executive Power "to prohibit or restrict the exportation of products or merchandise when it is so required by the need of the country." There is no such statute as No. 15,591. Statute No. 12,591 in its article 1 refers to the food stuffs, in other articles refers to merchandise and products. The decree implementing this law uses the following words: "The products subject to the establishment of prices." Statute No. 12,830 refers to raw materials, manufactured articles, location of operations, or products of any nature destined for food. In none of these statutes is glucose specifically mentioned as an article whose exportation is prohibited. By decree No. 34,683 of December 31, 1945, published at the Boletín Oficial of January 10, 1946, with [778] the purpose of "ensuring to the people a normal supply," it is said: "Article 1: As from the date of the present decree, exportation of articles of prime necessity will be subject to the system of previous permits. Article 2. The Secretaria de Industria y Comercio "authorizes to issue the corresponding permits when the needs of

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

the internal consumption and the provision emerging from the second paragraph are ensured.”

Article 3: It is also entrusted to said Secretaria the making up of the list of products and articles to which article 1 refers, which will be communicated to the Direccion General de Aduanas to take the pertinent measures.” The Secretaria by means of the resolution No. 2,209 of March 11, 1946, gave a list of articles of prime need; glucose does not appear among them. In March 23, 1946, other articles were added to the list and glucose does not appear there either. (Anales de Legislacion, 1946, pages 691 and 693.) It is only with resolution No. 6926/46 of August 29, 1946, that the Secretaria takes account of glucose to be included among the articles to which decree No. 34,683 refers. It is fixed at 4000 tons the exportable quota of glucose for the period between July 1st and December 31st, 1946. It is established that the permits “will be granted after proof of the exporters that they themselves have delivered for the internal consumption a quantity double to that for which they seek exportation. This resolution was in force until September 18, 1946, in which [779] date a new resolution No. 7499/46 was given, “according to which exportation of glucose will remain submitted to previous permits which will be granted as soon as the domestic requirements are covered.” From these references it is clear that exportation of glucose has not been prohibited, on the contrary it was

Plaintiff's Exhibit 62—(Continued)
(Deposition of Alberto Padilla.)

allowed, always provided that a previous export permit should be granted by the Secretaria de Industria y Comercio, which it only did under already mentioned conditions.

To the Fifth Interrogatory, he says:

We have not found other laws or rules than the ones mentioned in the previous answer.

To the Sixth Interrogatory, he says:

I have not found any decision of the Courts or resolutions of an administrative authority with interpretations referring to the granting of export permits. Referring to this and the previous answer I should mention that I have made a very thorough investigation of all laws, decrees, regulations and Court decisions.

To the Seventh Interrogatory, he says:

It is answered by the preceding answer.

To the Eighth Interrogatory, he says:

According to the terms of the letter of May 23, 1946, the delivery dates for glucose are between June and December 1946. I do not find any legal obstacle to fulfil the contract [780] in those months, since an export permit could be requested from the government.

To the Ninth Interrogatory, he says:

As for article 888 of our Civil Code "the obligation is extinguished when the object becomes physically or legally impossible without fault of the

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

debtor.” This article is complemented by article 953 which says: “The object of the legal transaction must be things that are in commerce or that by a special reason it is not prohibited that they be object of some lawful transactions. Transactions which are not made in accordance with this disposition are null and void as they are considered as not having any object.” On the other hand articles 2336 and 2338 of the same Code say that all things are in commerce whose alienation is not expressly prohibited or depending on a public authorization, declaring as out of commerce all those that are absolutely or relatively inalienable. Among these listed ones are those “which need a previous authorization for its alienation.” In this case a previous authorization has not been requested at any moment as to sale. For this reason I understand that the contract has always been in force relating to its object and that the legal impossibility to fulfil it can only be established by prohibition of the export permit. From this prohibition a frustration would have emerged that would have exempt the payment of damages because of breach of [781] contract. Article 514 of the Civil Code has a foot note of the codifier in which it is said that “cases of force majeure are deeds of men, as war, deeds of the sovereign or the will of the princes. Deeds of the sovereign are those acts emerging from its authority intended to diminish the rights of the citizens.” Exertion of the authority of the State, prohibiting

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

export permits will thus in this case be an example of force majeure.

To the Tenth Interrogatory, he says:

According to the Constitutional System in the Argentina Republic, a statute is preeminent to a decree which can only implement the corresponding statute without altering its meaning. (Article 86, inc. 2nd of the Constitution.) A statute, according to the Constitution is passed by the Legislative Power, consisting of a Senate and a Chamber of Deputies, while the decree is issued by the Executive Power. Resolutions or orders are issued by a Minister or head of a department and are subordinate to a decree which is issued by the President and one Minister. Since June 4, 1943 up to June 4, 1946, the de facto Government issued the so-called decree-laws which had been in force as law.

To the Eleventh Interrogatory, he says:

In case of a conflict, ministerial resolution will subordinate to a decree and a decree to a law. Article 31 of the Constitution says that the Constitution and the [782] statutes of the Nation are supreme law. The Supreme Court has established that "it should not be recognized to the Executive Power other faculties than the ones enumerated in article 86 of the Constitution among which it is not included the power to alter in any case nor in any matter the existing laws or statutes." (Fallos Supreme Court Decisions, volume 1, page 161; volume

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

112, page 367; volume 115, page 189.) The Supreme Court has also stated that "a ministerial resolution, although it may constitute an opinion referring to how the authority understands that law, should be construed, it has neither the authority nor the force of the decree, since the Executive Power can only issue it in the exercise of its constitutional powers, imposing formalities, requisites or conditions, which, without going against the meaning of the law, may ensure its more exact fulfilment." (Supreme Court Decisions volume 174, page 299; volume 176, page 353; volume 181, page 255; volume 184, page 660; volume 190, page 58; volume 191, page 514. etc.)

To the Twelfth Interrogatory, he says:

The letter of May 23, 1946, contains the acceptance of an offer according to article 1154 of the Civil Code. A contract is complete by the acceptance "as from the moment in which it has been sent to the proposer"; according to article 1155 this acceptance can be withdrawn "at any time before it reached the knowledge of the proposer." If withdrawal is attempted, after the acceptance reaches the proposer it causes damages as it is expressly said by said article. If the telegram was delivered after the acceptance of the offer was known by the offerer by means of the letter of May 23, 1946, it is clear that the withdrawal is ineffectual. To take advantage of article 1155 the offeree should be required to establish that his telegram was prior to

Plaintiff's Exhibit 62—(Continued)

(Deposition of Alberto Padilla.)

the receipt of his acceptance by the offerer.

To the Thirteenth Interrogatory, he says:

Interpretation of articles 1154 and 1155 has been made in the following terms: "Our commentators are in general inclined to the following doctrine: In principle the rule of article 1154 must be pre-eminent, the power to withdraw the acceptance while it has not reached the knowledge of the offerer according to article 1155 being considered as a limitation to the system by reason of equity. In our judgment the Court has followed this system: The contract is not considered definitely concluded until the moment in which the acceptance reaches the knowledge of the proposer and it is because of this that the offeree may withdraw his acceptance (article 1155, first part); but once this condition is fulfilled that is to say once the acceptance is known by the proposer, said condition functions retroactively and as a consequence from that moment coming in force of the contract will be considered as produced as from the moment in which [784] acceptance was sent (article 1154). (Salvat, Tratado de Derecho Civil Argentino, volume 5, page 40.) The author whose citation I quote has been judge of the Civil Court of Appeals and his opinions are generally followed in the decisions of the Court.

/s/ C. RAMOS,

CONSTANTINO RAMOS,

Interpreter.

/s/ ALBERTO PADILLA,

Witness.

/s/ JONES R. TROWBRIDGE,
Consul of the United States
of America. [785]

PLAINTIFF'S EXHIBIT 63

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMMERCIAL E IN-
DUSTRIAL S. A., a Corporation,
Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,
Defendants.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Republic of Argentina,
City of Buenos Aires,
Embassy of the United States of America—ss.

I, Jones R. Trowbridge, Consul of the United States of America at Buenos Aires, Argentina, do hereby certify that Mr. Hector A. R. Alfonso, Director of Exportation, the official in charge of issuing export licenses in the Republic of Argentina, did not appear to answer the interrogatories and the cross-interrogatories addressed to any Consul, Vice-Consul, or Consular Agent of the United States of America at Buenos Aires, Argentina, in the above-entitled cause. [786]

Dated at Buenos Aires, Argentina, this 5th day
of December, 1947.

/s/ JONES R. TROWBRIDGE,
Consul of the United States
of America. [787]

PLAINTIFF'S EXHIBIT 70

Toll Service and Telegrams
Place Called*

A-1660-ASA
(2-45)

MU 4371

For Abbreviations, See Reverse

	Telephone Messages Under 25c	Other Messages
May		
10 NY	6.50	
20 SF	3.15	
"	1.80	
21 "	4.90	
23 "	3.85	
24 "	2.25	
28 "	4.90	
29 "	4.20	
31 "	3.15	
Jun		
4 "	1.80	
5 "	4.55	
May		41.05
10 Argentina Intl-B.....	2.60	

Totals of Above Service Charges.....43.65

U. S. Tax—Telephone messages under	
25c—15%	10.26
Telephone messages over 24c and	
all domestic telegraph messages—	
25% .....	.26
International telegraph messages	
10%	

Total Carried to Bill.....54.17

*Explanation of Code Following “Place Called”:

A-Thts Company Telegram.

B-Other Company Telegram.

C-Collect Message. [789]

DEFENDANT'S EXHIBIT R-2

Engraw vs. Schenley

350 Fifth Avenue,

New York, N.Y.,

October 30, 1947,

at 10:15 o'clock A.M.

(Met pursuant to adjournment.)

Present:

Mr. Mesirov

Mr. Pickett

RALPH T. HEYMSFELD

resumed the stand and testified further as follows:

Mr. Mesirov: It is stipulated that this continuation of the examination of Ralph T. Heymsfeld

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

which is being held at the office of the defendant, at 350 Fifth Avenue, New York, in the absence of the Notary before whom Mr. Heymsfeld was sworn, shall have the same force and effect as though the examination had been continued in the presence of the Notary at his office at 10 East 40th Street, New York.

Mr. Pickett: So stipulated.

Direct Examination

(Continued)

By Mr. Mesirov:

Q. Mr. Heymsfeld, your counsel has produced a certain number of papers here, but has declined to allow their examination or copying, or state the substance of some thirteen memoranda or letters on the ground that they were privileged communications. Do I understand you [790] are making the claim of their being privileged communications and will not allow my examination or copying of these papers?

A. I will not make a blanket answer.

Q. Well, then, are they here?

Mr. Pickett: Yes, they are here.

Q. Do you want to make answer with reference to each one, or what?

A. The grounds may differ as to particular documents, yes.

Q. Will you please examine the documents as to which Mr. Pickett claimed privilege and tell us whether that claim is made on your behalf?

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Discussion off the record.)

A. In answer to the question I will state the following: That by assigning particular reason for refusing to submit these documents, I do not intend to limit any legal argument that may be made by counsel to the corporation concerning the right that the defendant may have to refuse to submit these documents for inspection. In general, these communications consist of communications to me of facts upon which my legal opinion is requested, or contain extracts of legal opinions by me or by my assistant under my direction. These documents also include certain papers which I consider to be my private working [791] papers, acting in my capacity as an attorney in connection with the transactions.

It is my position that you are not entitled to inspect these documents.

Q. Or copy them? A. Or copy them.

Q. And that you refuse to state the contents of them? A. That is correct, sir.

Mr. Mesirov: Is it agreed that these papers may be marked for identification?

Mr. Pickett: I am perfectly willing to have them marked for identification. Of course it is understood that the reporter is not going to look at them, either.

Mr. Mesirov: All right. We will do that later.

Q. Mr. Heymsfeld, where did you go to obtain

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

all these papers? Were they in the files of the company?

A. Some of these papers were in my own law department files. Other papers were in other files of the company.

Q. By the law department, you mean the law department of the Schenley Company?

A. Yes.

Q. What was Mr. C. W. Metcalf's position with your company in May, June, July, and, say, in August of 1946?

A. He was a consultant. He advised principally on [792] matters concerning the purchase of certain types of materials.

Q. Had he any authority to act?

A. So far as I know, he had no authority to act, except such authority as was given him in particular situations.

Q. From time to time?

A. From time to time. That is correct.

Q. In May of 1946 was Schenley in need of glucose?

A. I can't answer that question.

Q. Because you do not know, or because you——

A. (Interposing): Because I do not know.

Q. When did you first learn of the purchase by Schenley of glucose involved in this case?

A. I never learned of any purchase.

Mr. Pickett: Mr. Mesirov—the witness anticipated my objection.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. When did you first learn of the transaction, with regard to glucose, between Schenley and Engraw or Whipple?

A. My best recollection is that I first learned of a transaction with Mr. Whipple on June 5, 1946.

Q. And from whom did you learn that fact?

A. Mr. Metcalf.

Q. Was Mr. Metcalf at that time in New York?

A. He was. [793]

Q. And what did he tell you about it?

A. I refuse to state, because he came to get my legal opinion on the situation.

Q. Was he a full-time employee of Schenley at that time, or a regular employee? I will put it that way—was he a regular employee?

A. I would not call him a regular or full-time employee, and he did not participate in any of the benefits, by way of compensation and otherwise, that were available to full-time or regular employees. He was a consultant. My recollection is that he also had some outside business interests of his own, which he carried on at the same time.

Q. Will you tell us what Mr. Metcalf's authority was as regards the glucose transactions involved in this case?

A. So far as I know, his authority was solely that of a consultant, and adviser in connection with the transactions. He had no authority either to purchase this or any other glucose, nor did he have authority to enter into any agreement concerning this transaction.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Q. I show you Plaintiff's Exhibit 18-N, which is a wire from Metcalf to Donnelly. Was that telegram sent in connection with his duties as adviser or consultant?

A. I would say that it is clear from the telegram itself [794] that he is asking for details and information; and, if my recollection is correct, there is another memorandum in which he sets forth what his purpose may have been, and that is the memorandum of June 3rd from Mr. Metcalf to Mr. Kiefer.

Mr. Pickett: Exhibit 25-N.

The Witness: Yes, Exhibit 25-N.

Q. Doesn't the telegram and memorandum indicate to you that Mr. Metcalf was doing other things than mere advising?

A. Well, it doesn't indicate that he was doing anything other than advising, so far as this transaction was concerned. I have already indicated that, in connection with other situations, he did particular things that he was asked to do from time to time.

Q. I am speaking of this particular transaction, in which he evidently is trying to arrange for the shipment of this glucose from Argentina to Schenley.

A. Well, this would indicate to me exactly what his function was. Mr. Gusky was the man who runs our traffic department, and he is the man who is in charge of arranging transportation. He is

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

asking Mr. Metcalf's assistance in getting certain information, so that he can make preparations, if any preparations need be made. I think it is clear from this memorandum that Mr. Metcalf was certainly not going to undertake to arrange the transportation.

Q. Have you any knowledge of the request to the New York office of Schenley for the issuance of a letter of credit in this transaction?

A. No, sir.

Q. You say you have no knowledge?

A. That is right.

Q. Do you know whether or not the New York office refused to issue such letter of credit to cover this glucose?

A. You mean refused somebody's request to issue the letters?

Q. Yes.

A. There was a request that came from Engraw, which we refused.

Q. You are now referring to a communication addressed to Schenley from Engraw, are you?

A. That is correct, sir.

Q. Are you referring to the cable, Plaintiff's Exhibit 26-N, addressed to Cincinnati?

A. Yes, that was the cable I had in mind. Also, the cable which is marked Exhibit 32-N.

Q. That was likewise addressed to Cincinnati, was it not?

A. That is correct. [796]

Q. Do you know of any telephone call from

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Cincinnati to your New York office asking that the New York office arrange for the issuance of a letter of credit? A. I do not.

Q. You hadn't been asked with reference to that, with reference to issuing a letter of credit at that time?

A. I received no request to issue a letter of credit.

Q. If such a request had been made, to whom would it be addressed in your organization in New York?

A. The actual details of issuing a letter of credit would be handled with the bank, if handled in normal course, by the treasury department. A request might have been received by the New York office through any one of a number of channels, depending upon who was making the request for the issuance of the letter of credit.

Q. To whom would it be submitted for approval?

A. It would finally have to be approved by an executive officer of the company.

Q. You? A. No, sir.

Q. You mean any one of a number of executive officers?

A. I would answer that question in this way, that the treasurer of the company would proceed to secure the [797] final issuance of the letter of credit, if he were entrusted to do so by any one of a number of officers of the company; but no officer

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

of the company would authorize the issuance of the letter unless he were personally familiar with all of the details of the transaction or familiarized himself with them by communication with other officers of the company.

Q. Who was the first one in your New York office, then, to whom the glucose transaction which is involved in this case was submitted?

A. I am unable to state. I believe that the first officer in the New York office to whose attention the matter came was Mr. Seskis, who is a vice-president of the company, but I am not certain of that.

Q. Did Mr. Seskis discuss this matter with you?

A. So far as I know, no request was ever made to Mr. Seskis to issue a letter of credit in this transaction.

Q. Who was the first one to call your attention to this glucose transaction?

A. Mr. Metcalf.

Q. And was that the conversation of June 5th, did you say?

A. Yes, June 5th, to my best recollection.

Q. And that is the conversation, the substance of which you decline to give? [798]

A. That is correct, sir.

Q. Did you, about that time, have a conversation with Mr. Woolsey on the subject?

A. That is correct—almost directly after the first conversation.

Q. And what was the substance of that conversation?

A. I decline to state.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: Will you state for the record why?

The Witness: Because I consider it a privileged and confidential communication.

Q. Woolsey was assistant secretary, wasn't he, of the company at that time?

A. Yes, Woolsey was an assistant secretary of the company at that time.

Q. I show you a copy of a telegram addressed to Harold A. Whipple and signed Schenley Distillers Corporation by "Jas. E. Woolsey, assistant secretary," marked Plaintiff's Exhibit 31-N and ask you whether you know of the sending of this telegram by Mr. Woolsey.

A. Yes, I knew it was being sent.

Q. You knew it was being sent?

A. That is correct, sir?

Q. Did you direct him to send it?

A. May I state the circumstances?

Q. Certainly. [799]

A. Mr. Woolsey told me of a conversation that he had had with Mr. Whipple and stated that Mr. Whipple had requested that Mr. Woolsey confirm to him, by writing, what Mr. Woolsey told him in the conversation. I told Mr. Woolsey that I saw no objection to confirming it, in fact, I thought it was advisable to do so.

Q. Did you authorize the telephone conversation or the telephone notice on the part of Woolsey which this telegram confirmed?

A. I transmitted it, but did not authorize it.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. I don't quite understand your answer.

A. I don't mean to quibble, but I did not make the decision to give that notice to Mr. Whipple. That decision was made elsewhere in the company. I was told about it and instructed Mr. Woolsey to communicate with Mr. Whipple.

Q. Who made that decision?

A. To my best recollection, Mr. Kiefer.

Q. Of Cincinnati?

A. Mr. Kiefer spent most of his time in Cincinnati.

Q. And what is Mr. Kiefer's position with the company?

A. Mr. Kiefer is a vice-president in charge of the production department, of which the purchasing department is a division.

Q. And it was Mr. Kiefer's decision that this statement should be made to Mr. Whipple on behalf of the [800] Schenley Company?

A. It was Mr. Kiefer's decision that we would not go further with the purchase and, as I have stated, I then told Mr. Woolsey to communicate that decision to Mr. Whipple.

Q. Did Mr. Kiefer ask your advice as to whether or not that communication should be sent to Mr. Whipple, or did you merely follow his instructions to do so?

A. No. My best recollection is that Mr. Kiefer had made his decision and then discussed with me my opinion as to the procedure to be followed.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Q. The procedure you are referring to is as to the method of notifying Whipple or Engraw of his decision?

A. My recollection is when that decision was made we had already received a cable from Engraw, in which reference was made to contracts and to cancellation and to penalties, and Mr. Kiefer naturally sought my opinion in connection with the transaction, and the steps to be taken in it, and I gave him my advice as to the steps to be taken, because it was perfectly apparent that the parties were in a dispute.

Q. Plaintiff's Exhibit 33-N is a file memorandum made by Metcalf on June 11, 1946. Did Mr. Metcalf talk to you about that time, after his conversation with Whipple, as reported in this memorandum? [801]

A. Yes, he did talk to me about that time.

Q. Will you give me the substance of that conversation?

A. I refuse to give it, for the same reasons that I have given before.

Mr. Pickett: Let me state at this time, Mr. Mesirov, as I advised you before the examination today started, we found an office copy of a cablegram sent to Engraw dated June 11, 1946, which is now being photostated, and it should be here by this time. That may be the document you have in mind. I have asked Mr. Rosenfeld to see whether he cannot speed up the copies.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

(Discussion off the record.)

Q. I show you Plaintiff's Exhibit 34-N, dated June 13, headed "File memorandum," which I understand was made by Mr. Metcalf. Did Mr. Metcalf discuss with you the telephone message which he mentions in this memorandum?

A. My recollection is that Mr. Metcalf did tell me of a telephone conversation that he had with Mr. Stanton.

Q. What instructions, if any, did you give Mr. Metcalf with regard to the subject matter of the telephone call and his request for further information from Stanton?

A. I refuse to state, for the same reasons that I have previously given.

Q. Namely, that is a confidential communication and privileged? [802]

A. That is right. I was giving him my legal opinion as to the steps to be taken.

Mr. Pickett: At this point, Mr. Mesirov, if I may interrupt, we now have the photostats of the cable of June 11, 1946 to the plaintiff, which I hand you herewith.

Mr. Mesirov: Mark it for identification.

(Photostat of cable to Engraw, signed "Metcalf Distillers," June 11, 1946, marked Plaintiff's Exhibit 63-N for identification.)

Q. I show you Plaintiff's Exhibit 63-N for identification, which has just been produced by your

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

counsel, and ask you whether that cable was sent by Mr. Metcalf at your direction?

A. I prepared the cable and advised him to send it.

Q. And that was done at a conference had with Metcalf with regard to his talk with Whipple over the telephone, as reported in the memorandum dated June 11th? A. I don't recall that.

Q. Well, that is evident.

A. It would seem from the cable itself that it is a reply to a cable from Engraw.

(Discussion off the record.)

Q. Do you know Emanuel R. Dichter?

A. I know who he is. I have never met him.

Q. Wasn't he an employee of Schenley, attached to your New York office?

A. I don't know, at the moment, whether he was employed generally, or specially employed. I can find out easily enough. But, in either event, he performed some services for Schenley over a relatively short period of time, and in South America.

Q. You know, of course, that Metcalf sent Mr. Dichter to Buenos Aires?

A. I do know that, yes.

Q. Did you tell him to? A. No, I did not.

Q. Did you know of a time he telephoned to Dichter at Rio to go to Buenos Aires?

A. I knew that he was going to send Mr. Dichter from Brazil to the Argentine.

Q. Did you authorize him to do so?

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

A. I did not authorize him to do so, no.

Q. Did he act on his own authority in doing it?

A. I can't answer that question.

Q. But he did talk to you before he telephoned Mr. Dichter at Brazil? A. That is correct.

Q. What do you know about the telephone conversations between Dichter and Metcalf while Dichter was in the [804] Argentine?

A. Only what Mr. Metcalf told me of them.

Q. What did he report to you as to the telephone conversations he had with Dichter?

A. I refuse to answer, on the ground previously stated.

Q. Do you happen to know why Dichter was sent to Brazil?

A. Yes. My recollection is that he was sent down in connection with the purchase or possible purchase of a material called manioc.

Q. Is that a substitute for glucose or a product used for the same purposes?

A. I do not believe it is, no, sir.

Q. I refer you to Plaintiff's Exhibit 36-N, consisting of a copy of a letter dated June 26, 1946, addressed to Mr. Ralph Stanton, and signed "Schenley Distillers Corporation, C. W. Metcalf." Was this letter sent under your instructions by Mr. Metcalf? A. It was sent by my advice.

Q. And I suppose you will state that Mr. Metcalf was still a consultant when he wrote this letter under your advice, was he?

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

A. You mean was he acting in a consultant capacity in writing this letter?

Q. Yes. [805]

A. He was replying to a letter which had been addressed to him or to his attention.

Q. Was that a reply to a letter dated June 24, Plaintiff's Exhibit 35-N? A. Yes.

Mr. Pickett: Exhibit 35-N is the letter of June 24, 1936, and Exhibit 36-N referred to that letter of June 24th?

The Witness: That is right.

Q. I call your attention to Plaintiff's Exhibit 2-N, which is a copy of a cable addressed to "Metcalf Schenley Distillers, Inc." and signed "Engraw Dichter Berger" under date of July 7th. Was this cable submitted to you by Mr. Metcalf?

A. This cable came to my attention. I cannot say that I recall whether Metcalf showed it to me or not. I would assume that it was Metcalf.

Q. Did you have a talk with Metcalf with regard to this cable?

A. I had a talk with Metcalf with regard to the subject matter of the cable, yes.

Q. What instructions did you give Metcalf with regard to it?

A. I gave him no instructions with regard to it. I advised him concerning it. [806]

Q. What advice did you give him?

A. I refuse to state, for the same reasons that I have previously given.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. Did Mr. Metcalf tell you about a telephone call that he received from Dichter, after this cable of July 8th was sent, confirming the views that he expressed therein?

A. I refuse to answer that question, on the grounds I have previously given.

Q. You mean you refuse to state whether or not Mr. Metcalf told you that he had a telephone call from Dichter subsequent to July 8th?

A. Mr. Mesirov, if I understood your question, you asked me indirectly as to the substance of what he told me.

(Discussion off the record.)

Q. I mean, in which Dichter confirmed what he recommended in this cable.

A. That I refuse to answer.

Q. Did he tell you that he had a telephone call from Mr. Dichter following his showing you the cable dated July 8th?

Mr. Pickett: May we have the last question?

(Question read.)

Mr. Pickett: I think the witness testified that he [807] didn't know whether Metcalf had showed him the cable or just discussed the substance with him.

A. I don't recall whether or not he showed me the cable. He did tell me that he had had a telephone conversation with Mr. Berger. I don't recall

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

whether or not he told me of a conversation with Dichter, as to which Dichter testified.

Q. I show you Plaintiff's Exhibit 38-N, headed "Inter-office memorandum," July 11, 1946, evidently made by C. W. Metcalf, as to a telephone conversation had by him with Mr. Berger, and ask you whether Mr. Metcalf submitted this memorandum to you or conveyed the information as to this telephone conversation. A. Yes.

Q. What was the result of the talk you had with Mr. Metcalf with regard to this telephone conversation?

A. One result was that I retained the services of Momsen and Freeman.

Q. I show you Plaintiff's Exhibit 39-N, headed "Inter-office communication," July 12, 1946, in which Metcalf states that he told Mr. Berger that "We have retained Momsen & Freeman of New York to represent us in settling this matter," and Berger and Dichter were to get in touch with Dr. Goytia in reference to the matter.

Did you instruct Metcalf to notify Berger and Dichter [808] to take up the matter with Mr. Goytia? A. I did not.

Q. Who did?

A. I don't know that anybody did.

Q. Do you mean that Metcalf, acting on his own authority, had referred the matter to Dr. Goytia?

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

A. No. I referred the matter to Dr. Goytia for opinion on a particular question.

Q. And that was what?

A. The question concerning the effect of registration of a contract with the Chamber of Commerce in the Argentine.

Q. The memorandum made by Metcalf under date of July 12th states: "I talked to Messrs. Berger and Dichter regarding the Engraw glucose matter. I told Mr. Berger that we had retained Momsen and Freeman of New York to represent us in settling this matter."

And then follows the statement that Dr. Victor Goytia was Momsen and Freeman's representative in Argentina, and that Dichter and Berger were to keep in touch with Dr. Goytia in relation to this matter.

Did Metcalf show you this inter-office communication, or was that inter-office communication sent to you? A. Not that I recall.

Q. Did he tell you the substance of this talk with Berger and Dichter, as stated in this memorandum? [809]

A. He told me the substance of his talk with Berger and Dichter, but I would not say that this memorandum correctly reflects what he told me.

Q. Do you mean to say that Mr. Metcalf would inform Dichter, who was your employee, and Berger, representing the plaintiff in this case, that

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Dr. Goytia was to negotiate a settlement, if no such purpose was authorized?

Mr. Pickett: I am going to object to the form of the question. It assumes a state of facts which has not been shown to be a correct one, to wit, that Dr. Goytia was to negotiate to settle the matter and had been retained for that purpose.

Mr. Mesirov: Now, will you answer the question?

(Question read.)

A. Mr. Mesirov, it seems to me we are just arguing with each other as to what Metcalf would or would not tell. I cannot tell what Metcalf would say. I am simply saying that if Metcalf did make this statement, it was not in accordance with the facts.

Q. Are you saying now that Momsen and Freeman were not engaged to represent you in settling this matter?

A. Most emphatically, they were not.

Q. Did you receive any reports from Dr. Goytia, either direct or through Momsen and Freeman, as to their negotiations with Engraw? [810]

A. I received reports from Momsen and Freeman as to what had occurred—I would not call them negotiations—between Dr. Goytia and Engraw. It was my understanding that Dr. Goytia represented Engraw.

Q. Represented Engraw?

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

A. That is correct. And for the limited purpose for which we were engaging Momsen and Freeman, I had no objection to his representing Engraw.

Q. Did Mr. Metcalf tell you that he was informed by Mr. Berger, when Metcalf suggested they go to see Dr. Goytia, that the latter had represented Engraw in some matters and that Metcalf's reply was that he saw no objection to Goytia acting for you, in spite of that fact?

A. Metcalf never made that statement to me. I did know that Dr. Goytia represented Engraw.

Q. How did you know that?

A. I learned it. I cannot say whether I learned that first from Momsen and Freeman or from Mr. Metcalf.

Q. Were you advised, Mr. Heymsfeld, of the contents, or did you receive copies, of cables addressed to Momsen and Freeman from Goytia, two of them dated July 18th and one dated July 22nd, being Plaintiff's Exhibits 3-N and 4-N and 5-N?

The Witness: Would you repeat the question?

Q. Yes. [811]

(Question read.)

A. Yes.

Q. What instructions did you give counsel as to these communications?

A. I refuse to answer that.

Q. On what ground?

A. On the ground that any conversation between

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)
myself and these counsel would be confidential and privileged.

Q. I show you Plaintiff's Exhibit 42-N, being a copy of a cable addressed to "L. C. Metcalf, Schenley Distillers, N Yk.," dated July 12th, reading as follows: "20% letter credit margin acceptable for liquidation program," signed "Engraw."

Did Mr. Metcalf show you this cable?

A. My recollection is that he did.

Q. That he did? A. That he did.

Q. Have you any memorandum of a communication from Metcalf to which this cable must have been a reply?

Mr. Pickett: I object to the form of the question. I don't know that there must have been any such communication to which this cable was a reply. My objection is purely as to the form of the question, Mr. Mesirov.

Q. To what was this cable a reply?

A. I cannot state. I do not know. [812]

Q. Did you have any conversation with Metcalf with regard to the amount of letter credit which would be acceptable to Engraw in a program of liquidation?

A. I know I had no such conversation at about that time. Whether there was any conversation at about that time. Whether there was any conversation later, I don't recall. Perhaps I can refresh my memory from the files.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Q. Did you instruct Metcalf to inquire whether a 20% margin would be acceptable to Engraw in a program of liquidation? A. No.

Q. Is there any alleged confidential communication which relates to this subject as to which this cable was a reply?

Mr. Pickett: Are you willing to accept my answer to that?

Mr. Mesirov: Yes.

Mr. Pickett: The answer is, if there is, I have never seen it.

(Discussion off the record.)

Q. Do you know to what this cable was a reply?

A. No, sir, I do not.

Q. I show you Plaintiff's Exhibit 6-N, being a copy of a memorandum marked "Inter-office communication" from Mr. G. Fred Berger to Mr. E. R. Dichter, dated August 2, 1946. [813] and ask you whether or not you saw the original of this memorandum.

A. I have seen a ribbon copy of this memorandum, without certain of the notations on it which this memorandum has.

Mr. Pickett: The original of this memorandum, a copy of which is marked Exhibit 6-N, was produced by me at the previous hearing. At that time you did not want it marked. If you want to mark the original memorandum—

Mr. Mesirov: All right; mark the original.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

Mr. Pickett: I have here the original document, and I am now producing it for the purpose of being marked.

Q. Is this the memorandum just now produced by Mr. Pickett, which you saw? A. Yes.

Mr. Mesirov: Mark it.

(Original of memorandum marked "Inter-office communication" from Mr. G. Fred Berger to Mr. E. R. Dichter, August 2, 1946, marked Plaintiff's Exhibit 64-N for Identification.)

Q. From whom did you receive this memorandum?

A. I received this from my assistant, Mr. Rosenfeld, who told me he had received it from Mr. Dichter.

Q. Did you discuss the subject matter of this memorandum with any one in your company?

A. No, sir, I did not, that I recall.

Q. What action, if any, did you take after receiving this memorandum? [814]

A. I received this from my assistant, Mr. Rosenfeld, who told me he had received it from Mr. Dichter.

Q. Did you discuss the subject matter of this memorandum with any one in your company?

A. No, sir, I did not, that I recall.

Q. What action, if any, did you take after receiving this memorandum?

A. I took no action.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. I show you a copy of a cable dated August 8th, addressed to Emanuel Dichter at 150 Bennett Avenue, New York, signed "Berger," and ask you whether Mr. Dichter, or anyone else, informed you of having received this cable?

A. Not that I recall.

Mr. Mesirov: Mark it for identification.

(Copy of cable dated August 8th, Berger to Dichter, marked Plaintiff's Exhibit 85-N for Identification.)

Q. I show you copy of a cable marked in pencil August 8th, addressed to Berger, stating, "Legal department will inform promptly," and signed "Dichter." Did Dichter communicate with you before sending this cable?

Mr. Pickett: I object to the form of the question, because it assumes a state of facts not yet shown, to wit, that Mr. Dichter ever sent this cable.

A. No, he did not.

Q. Did he ever send you a copy of this cable?

A. No, sir.

Q. Did you know that he sent this cable?

A. I did not.

Q. Do you know whether any officer of your company received a copy of this cable?

Mr. Pickett: You understand, Mr. Mesirov, my saying that objection is made as to form.

A. Not to my knowledge.

Mr. Mesirov: Mark it.

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

(Copy of cable, addressed to Berger, signed Dichter, August 8th, marked Plaintiff's Exhibit 66-N for Identification.)

Q. Mr. Heymsfeld, did you instruct Mr. Woolsey to inform Donnelly that the Schenley legal department would handle the matter, this glucose matter, and that Donnelly was to take no further part in it? A. I don't recall that I did.

Q. Would you say that you did not instruct him to that effect?

A. I will say categorically that I did not instruct him to call Mr. Donnelly and tell him that.

Q. Did you tell Mr. Woolsey that the entire matter would be handled, from that point on, by the legal department?

A. I told him that the matter of the dispute had been referred to the legal department. [816]

Q. And did you tell him that the matter would be handled by the legal department?

A. I don't know exactly what words I used, but it was perfectly evident that any action that the company took would be as advised by the company's lawyers, in the same way that I would assume that any action that the other side took, they took on the advice of their counsel.

Q. When you say "by the company's lawyers," you mean by the legal department of the company, don't you?

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

A. Not necessarily. As the matter stood at that time, on my advice, as an attorney.

Q. As a matter of fact, all subsequent conferences, communications or negotiations were conducted by you or your legal department, were they not?

A. I conducted no negotiations of any kind, until August 27, 1946, when I had my conference with Mr. Hosey. On the question of whether that was a negotiation or not, I am not going to try to characterize that conversation; but I think the record is perfectly clear that from the date that we received a cable from Engraw stating that there were penalties and indicating that this matter would become a legal matter, that the matter was referred to me for advice, and that I did advise in every instance in which I was kept informed of the developments. On the other hand, as I believe I stated on the first day, I made no decisions as to whether [817] we were to buy the glucose or not to buy it, or proceed with the purchase or attempt to liquidate it as part of a settlement of this controversy, or any of those steps. Those were matters of business decision which I did not make.

Q. Who made them?

A. Well, if you take them one at a time, I think the record pretty well shows who made which decisions; and as to some, I would have to say that I don't know who made them.

Q. Then do I understand that the only persons

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

who decided anything for Schenley with regard to the glucose matter were the persons whose names have been mentioned in the depositions so far taken or in the memoranda and letters so far produced?

A. I can't answer that question.

Q. By "I can't answer that question," what do you mean?

A. I mean, I don't understand the question.

Mr. Mesirov: Read it to the witness.

(Question read.)

Q. The reason I put it that way is that you have made a statement that these papers show who acted as to what.

A. I said the testimony showed, Mr. Mesirov.

Mr. Pickett: He said as to other things, he didn't know; who made the decision.

(Discussion off the record.)

Q. Who finally decided to refuse to go on with the [818] purchase?

A. My best recollection is that it was Mr. Kiefer.

Q. And he had full authority to so decide?

A. He did.

Q. Wasn't it under your instructions that he decided not to go on? A. Certainly not.

Q. You mean to say that Mr. Kiefer was authorized to involve your company in a possible suit involving a half a million or \$400,000 purchase?

A. Certainly not. That is a rhetorical question, if I ever heard one.

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

Q. Was his decision made upon your approval?

A. Certainly not. He didn't ask my approval or disapproval on that decision.

Q. If any one other than the persons mentioned in the testimony and referred to in these memoranda had been consulted, and decided on this matter, you would know of it, wouldn't you?

A. In the normal course I would expect to learn of it, yes.

Q. Have you examined all of your files with regard to this glucose matter? A. Yes.

Q. Would or would not your files show if someone [819] other than the persons whose names have already appeared made any decision with regard to this matter?

A. They might or might not.

Q. Do they show the name of any other person than those that have been mentioned?

A. No.

Q. I believe it has been testified that this glucose was intended to be used by Many Blanc & Co.?

Mr. Pickett: I don't think that is the testimony, Mr. Mesirov.

Mr. Mesirov: I think it is in the West Coast testimony.

A. I can perhaps shorten this by saying that I do not know for what purpose this glucose was to be used.

Q. Are you a director of Many Blanc?

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

A. No. I never have been.

Q. I notice that at least some of the Metcalf memorandums are marked "Inter-office communications." To whom would they be sent?

A. I can't answer that. I don't know. He seemed to have made a practice of marking some of his file memoranda "Inter-office communication." In some instances we found ribbon copies of papers marked "Inter-office communication," (in ink) RTH in Mr. Metcalf's file.

Q. Did you have a representative in the Argentine in 1946? [820]

A. You mean in the whiskey business?

Q. Representative of the Schenley companies.

A. There was a period of time, I can't say at the moment whether it was in 1946 or not, when we had a sales representative in the Argentine, whose function it was to sell, take orders for whiskey, and promote their sale.

Q. Only for importing whiskey into the Argentine, is that it?

A. I believe that is correct, sir.

Q. Did you ever buy anything in the Argentine?

A. Not that I know of, but I cannot say definitely whether the company did or not.

Q. Mr. Gusky's name appears in some of the communications with reference to this matter. What was his position with your company?

A. Mr. Guskey was the company's traffic mana-

Defendant's Exhibit R-2—(Continued)

(Deposition of Ralph T. Heymsfeld.)

ger and it was his duty to arrange transportation.

Q. And where was he located?

A. His principal office was in New York, but I believe that he maintained a branch office in Cincinnati as well, which was headed by one of his assistants.

Q. Who informed him that Schenley had purchased this glucose in the Argentine?

A. You understand that there was no purchase.

Mr. Mesirov: Don't let us quibble with words.

The Witness: If you want to change that to "transaction"—

(Discussion off the record.)

A. I do not know how he learned of the glucose transaction.

Q. You don't know?

A. I don't know.

(Whereupon, at 1:00 o'clock p.m., an adjournment was taken to 2:45 o'clock p.m.)

Afternoon Session

2:45 o'Clock P.M.

Mr. Pickett: Mr. Mesirov, in accord with our understanding, I am going to use for marking by the reporter, on the reverse side, the various documents as to which privilege has been claimed and which we have not permitted for your inspection for copying.

Mr. Mesirov: You of course understand that as

Defendant's Exhibit R-2—(Continued)

to the documents which you are now offering to have marked only, such production and marking is not taken by me in satisfaction of the order made by the Court to produce them in California.

Mr. Pickett: My understanding—I may be wrong on [822] this—is that the order does not relate to any of these documents.

Mr. Mesirov: I merely want to call attention to it, so that they don't have to argue back and forth. That is so understood?

Mr. Pickett: That is correct.

Mr. Mesirov: All right. Proceed.

Mr. Pickett: First, I have here the record of a telephone conversation between Mr. Woolsey and Mr. Heymsfeld on June 11, 1946, which is referred to on page 122 of the minutes.

(Record of telephone conversation, Mr. Woolsey and Mr. Heymsfeld, June 11, 1946, marked Plaintiff's Exhibit 67-N for identification.)

Mr. Pickett: The next document, sir, is one of those referred to on pages 140 and 141 of the minutes. This is a memorandum dated May 15, 1946, from Mr. R. H. Baglin to Mr. Woolsey.

(Memorandum, R. H. Baglin to Woolsey, marked Plaintiff's Exhibit 68-N for identification.)

Mr. Pickett: The second of those three documents is a memorandum dated May 17, 1946, to R. H. Baglin from Mr. Woolsey.

Defendant's Exhibit R-2—(Continued)

(Memorandum, May 17, 1946, Mr. Woolsey to Mr. R. H. Baglin, marked Plaintiff's Exhibit 69-N for identification.)

Mr. Pickett: The third of those documents is a memorandum dated May 20, 1946, from Mr. Woolsey to Mr. R. H. Baglin.

(Memorandum, May 20, 1946, Mr. Woolsey to Mr. B. H. Baglin marked Plaintiff's Exhibit 70-N for Identification.)

Mr. Pickett: The next is a document referred to on page 142 of the minutes. This is a memorandum or letter from Mr. Seasonwein to Mr. Woolsey dated May 28, 1946, and attached to that is a copy of a letter from the law firm of Cooke and signed "Beneman," dated May 21, 1946, which is addressed to Mr. R. H. Baglin.

(Memorandum, May 28, 1946, Mr. Seasonwein to Mr. Woolsey, with attachment above referred to, marked Plaintiff's Exhibit 71-N for Identification.)

Mr. Pickett: Next, is the memorandum from Mr. Woolsey to Mr. Seasonwein dated June 3, 1946, which is referred to at the bottom of page 142 of the minutes.

(Memorandum, June 3, 1946, Mr. Woolsey to Mr. Seasonwein, marked Plaintiff's Exhibit 72-N for Identification.)

Mr. Pickett: Next, is a communication from Mr. Woolsey to Mr. R. H. Baglin dated June 4,

Defendant's Exhibit R-2—(Continued)

1946, which is referred to at the bottom of page 142 and the top of page 143 of the minutes.

(Communication, June 4, 1946, Mr. Woolsey to Mr. R. H. Baglin, marked Plaintiff's Exhibit 73-N for Identification.)

Mr. Pickett: Next, is the memorandum from Mr. G. E. [824] Baglin to Mr. Woolsey, dated June 5, 1946, as referred to on page 143 of the minutes. This is three pages long.

(Memorandum, three pages, June 5, 1946, Mr. G. E. Baglin to Mr. Woolsey, marked Plaintiff's Exhibit 74-N for identification.)

Mr. Pickett: Next, is the memorandum headed "Memorandum for the file" bearing Mr. Heymsfeld's name at the bottom, dated June 6, 1946, which is referred to on pages 146 and 147 of the minutes. This document is nine pages long.

(File memorandum bearing Mr. Heymsfeld's name, June 8, 1946, nine pages, marked Plaintiff's Exhibit 75-N for Identification.)

Mr. Pickett: Next is the memorandum dated June 10th, with Mr. Heymsfeld's name at the bottom, referred to on page 147 of the minutes.

(Memorandum, June 10th, Mr. Heymsfeld's name at the bottom, marked Plaintiff's Exhibit 76-N for Identification.)

Mr. Pickett: Next is the memorandum of June 24, 1946, from Mr. Metcalf to Mr. Heymsfeld, which is referred to on page 147 of the minutes.

Defendant's Exhibit R-2—(Continued)

(Memorandum, June 24, 1946, Mr. Metcalf to Mr. Heymsfeld, marked Plaintiff's Exhibit 77-N for Identification.)

Mr. Pickett: Next is a memorandum from Mr. Heymsfeld to Mr. Metcalf dated June 26, 1946, referred to at the bottom of page 147 of the minutes.

(Memorandum, June 26, 1946, Mr. Heymsfeld to Mr. Metcalf, marked Plaintiff's Exhibit 78-N for Identification.)

Mr. Pickett: Now I have the memorandum from Mr. Heymsfeld to Mr. Caaden dated July 12, 1946, referred to on page 146 of the minutes.

(Memorandum, July 12, 1946, Mr. Heymsfeld to Mr. Caaden, marked Plaintiff's Exhibit 79-N for Identification.)

Mr. Pickett: That is all.

RALPH T. HEYMSFELD

resumed the stand and further testified as follows:

Cross-Examination

By Mr. Pickett:

Q. Mr. Heymsfeld, you were asked about a telephone conversation which you had with Mr. Woolsey on June 6, 1946, specifically as to instructions which you gave to Mr. Woolsey to be communicated to Mr. Donnelly. Confining yourself to that subject, will you state what you told Mr. Woolsey about it?

Defendant's Exhibit R-2—(Continued)
(Deposition of Ralph T. Heymsfeld.)

A. As I have testified, I did not tell Mr. Woolsey to instruct Mr. Donnelly not to do anything further in the matter. I did tell Mr. Woolsey that the matter had been referred to the legal department and for him to make sure that no one in the company's employ on the Coast took any steps in the matter without clearing with him, and in turn, with me. [826]

Mr. Pickett: That is all.

(Discussion off the record.)

Mr. Mesirov: That is all.

(Deposition closed.) [827]

[Title of District Court and Cause.]

The foregoing testimony of said Ralph T. Heymsfeld being from pages 104 to 195, both inclusive, the changes and corrections made in the testimony by said witness, Ralph T. Heymsfeld, were each duly initialed by him and were to correct errors; said corrections appearing on pages 116; 154 and 188.

/s/ RALPH T. HEYMSFELD.

Sworn and subscribed to before me by said Ralph T. Heymsfeld this 21st day of November, A.D. 1947.

[Seal]

JAMES B. KILSHEIMER,

Notary Public in the State of
New York. [828]

DEFENDANT'S EXHIBIT R-3

(Left-hand Side of Photostat)

50 Gal

Equals $5\frac{1}{8}$ # (gal.

Argentine Glucose

1300 Tons till Dec 31

100 T 1 mo after. balance in Dec

50 T June

9.6—10.2 # (gal.

43—45 Baume

Crystal clear

42.8 —80.8 balling up

(4 to 6c)	2c 1 # duty	fob.
22.3c 1 # in wood barrels		W Coast
300 Kl. equals 660 #		port.

Prior 50 T 1 mo for 6 mo. L of credit

1000 July.—

Jan 1 3 ts 500 ts monthly

(Right-hand side of photostat)

Harold:

Whipple importer—

Drums

Mut 437

45-60 days.

50 T / — to 100 T

higher than ceiling

no violation.

$\frac{3}{4}$ # 1 case. sugar.

PL. EX. 7-N ID. 10/22/47

Defendant's Exhibit R-3—(Continued)
(Right-hand side of Photostat)

Wednesday

April							June						
S	M	T	W	T	F	S	S	M	T	W	T	F	S
	1	2	3	4	5	6							1
7	8	9	10	11	12	13	2	3	4	5	6	7	8
14	15	16	17	18	19	20	9	10	11	12	13	14	15
21	22	23	24	25	26	27	16	17	18	19	20	21	22
28	29	30	31				23	24	25	26	27	28	29
							30						

Mr. Whipple)

Ambas. 36.50)

Mr. Rowe—(Shorthand notation)

Do 0516

ada

PL. EX. 8-N ID 10/22/47

(Left-hand Side of Photostat)

Monday

May							3	July						
S	M	T	W	T	F	S		S	M	T	W	T	F	S
			1	2	3	4			1	2	3	4	5	6
5	6	7	8	8	10	11		7	8	9	10	11	12	13
12	13	14	15	16	17	18		14	15	16	17	18	19	20
19	20	21	22	23	24	25		21	22	23	24	25	26	27
26	27	28	29	30	31			28	29	30	31			

Mr. Petrov (Notation in shorthand).

Fresno op. 225 Thomas

Mr. Parr

Mr. Pobat

L A op. 17 Whipple

(Shorthand notation) op. 225 Harrison

Macabee pa. 6194

Defendant's Exhibit R-3—(Continued)
(Upper Center of Photostat)

If Payment is Made at Our Office, Please Present
Bill and Bill Stub.

June 6, 1946

(Bell Telephone Insignia)

To The Pacific Telephone and Telegraph Co., Dr.
Addresses of Business Offices Are Shown on
the Back of This Bill

Entered in Recurring Charge Schedule 7/30/46.

If this bill is not paid within fifteen days from date
of presentation, service may be discontinued, in
which event restoration will not be made until this
bill has been paid.

Terms N/c

Amt. Disc.

Extension DA 7/31

N.O Initial

Bill Check HO 7/20/46

B/C Audit GGH 7/31

Schenley Distilleries, Inc.,
900 Battery St.

Message	Unit Rates	Date
Class of Service		
Included with Zone Service Charge.		

Each Additional
Message Unit

Each Residence

Message Service 60 Mess. Units	31½c
--------------------------------	------

Each Business

Individual Line 85 Mess. Units	31½c
--------------------------------	------

Com'l P.B.K.	31½c
--------------	------

Defendant's Exhibit R-3—(Continued)

Zone Service Charges (Incl. U.S. Tax of .89 6.84
For One Month Preceding

Date of This Bill

Message Unit Charges 178

To Date of This Bill

(Total Message Units Used (Incl. U.S. Tax of
.49) 3.75

Toll, Telegram and Messenger Charges 187.83

Paid By Check No.

Date

(Statement Enclosed)

Other Charges and Credits (Explanation En-
closed)

Directory Advertising Charges for One Month
Beginning with Date of This Bill

(Please Deduct From Total Any Amount of
This)

(Balance Paid Before Receiving This Bill)

Balance from Previous Bill 160.87

Total 359.29

Cs. 160.87

1 OK—L Proxel (S) 198.42

Defendant's Exhibit R-3—(Continued)

(Upper Left-hand Side of Photostat)

Toll Service and Telegrams A-1890-CA

EX 7242 Place Called* (4-45)

For Abbreviations See Reverse

Telephone	Other
Messages	Messages
Under 25c	

May

6	HARRIA LA		1.80
7	77506 BKFD		1.15
	DONNELLY MRCD (C)		.75
	90 CRML		.80
9	4300 SSF	10	
	40673 BURL	15	
10	40483 BURL	15	
	90 CRML		.65
13	BOYD BKFD		2.75
	„		1.55
	HUGHS HUGH		.75
14	xWhipple LA		4.55
	TURNER LVMR		.60
	FKT 9945 LA		2.05
	BALLZER CINN		11.15
16	40673 BURL	20	
	MACABER RIVBK		.75
	FISHEL KGSBG		1.25
17	4300 SSF	10	
	AMENTA BKFD		2.35
	ROSENST EL LA		4.20
	EPSTEIN PJLA		7.10

Defendant's Exhibit R-3—(Continued)
 (Left-hand Side of Photostat) (Continued)

Totals of Above Service Charges

U. S. Tax—Telephone Message under 25c—15%

Telephone messages over 24c each and all domestic telegraph messages, 25%.

International Telegraph Messages—10%

Total Carried to Bill

*Explanation of Code Following "Place Called"

A—This Company Telegram.

B—Other Company Telegram.

C—Collect Message

(Right-hand Side of Photostat)

Toll Service and Telegrams—A-1890-CA

EX 7242 FWD Place Called* (4-45)

For Abbreviations See Reverse

Telephone Messages Under 25c	Other Messages
------------------------------------	-------------------

MAY

20 4300 SSF 20

" 10

22 40673 BURL 15

HARRISON TRLK 1.35

FRIFFEN CINN 15.95

23 TEDLOCK DOWN 5.60

EX 9593 L 1.35

DR 7011La 1.35

99 ELK GR .70

REDLOCK DOWN 3.15

Defendant's Exhibit R-3—(Continued)

(Right-hand Side of Photostat) (Continued)

24 HARRIGAN SELMA	1.25
xWHIPPLE LA	4.55
217 PET	.30
CHILLA FRS	1.15
1207 KERMAN	1.05
RAYMOND LA	1.80
BERSTIN PNX	3.75
MALOY MT VERN	3.75
27 31241 PNC	1.45
SMITY WASH DC	3.50
CINN (B)	1.46

Totals of Above Service Charges

U. S. Tax—Telephone messages under 25c—15%	
Telephone messages over 24c each and)	
	) 25%
all domestic telegraph messages)
International telegraph messages 10%	
PL. EX 9-N ID 10/22/47	

(Left-hand side of Photostat)

Toll Service and Telegrams

EX 7242 FWD	A-1890-CA
Place Called*	(4-45)

For Abbreviations See Reserve.

	Telephone	Other
	Messages	Messages
	Under 25c	
May		
27 MORRISON WASH DC		14.30
AMENTA BKFD		5.15
“		7.25

Defendant's Exhibit R-3—(Continued)

(Left-hand side of Photostat)—(Continued)

28	MOLICKSON KERMAN	1.05
29	BERFRELL OKDL	.75
	MCABSE RVBK	.95
	FOLULER NLK	.95
	HILL MDO	.65
	CHOOIJIN FRS	1.15
	5F31 SGR	1.25
	1207 KERMA	1.05
31	607 CRML	.65
	350 “	.65
	500 “	.65
	900 “	.80
	691 “	.65
Jun		
	3 6194 PA	1.36
	LYDEKCER MDO	.80
	POOCHINELLI TRLK	.75
	ARMENTO BKFD	1.95

Totals of Above Service Charges

U.S. Tax—Telephone messages under 25c, 15%.

Telephone messages over 24c each and all domestic telegraph messages, 25%.

International telegraph messages, 10%.

Total Carried to Bill

*Explanation of Code following “Place Called”:

A—This Company Telegram.

B—Other Company Telegram.

C—Collect Message. [839]

Defendant's Exhibit R-3—(Continued)

(Right-hand side of Photostat)

Toll Service and Telegrams

A-1890-CA

(4-45)

EX 7242 FWD

Place Called*

For Abbreviations See Reverse.

Telephone	Other
Messages	Messages
Under 25c	

Jun

3 43511 FRS	1.45
-------------	------

“	.90
---	-----

TEDLOCK ARTESA	5.95
----------------	------

187 ST HLN	.40
------------	-----

Totals of Above Service Charges	1.15	149.21
---------------------------------	------	--------

U.S. Tax—Telephone messages under 25c, 15%.

Telephone messages over 24c each

and all domestic telegraph messages,

25%	.17	37.30
-----	-----	-------

International telegraph messages, 10%.

Total Carried to Bill	187.83
-----------------------	--------

*Explanation of Code Following “Place Called”:

A—This Company Telegram.

B—Other Company Telegram.

C—Collect Message.

PL. EX. 9-N ID 10/22/47. [840]

Defendant's Exhibit R-3—(Continued)

Copy of Vendor's Bill

July 11, 1946

Date

Vendor Pacific Tel. & Tel. Co.

444 Bush Street

San Francisco, Calif.

Shipper.....

Invoice No. YU 0473

Purchase Order #.....

Terms

F.O.B.

Freight Bill No.

Waybill No.

Car No.

Consignee Schenley Distillers Corp.

850 Battery Street

San Francisco 11, Calif.

Description	Quantity		Amount	
	Weight	Rate	Prepaid	Collect

Entered in Recurring Charge Schedule.

Date 7/23/46.

Initial H.O.

Tel mess. under .25.

ZONE SER	\$	6.35
MESS. UNITS		.72
TOLL, ETC.		104.38
BALANCE		100.58
TOTAL		301.33
Other Mess.		\$111.43
June [841]		

Defendant's Exhibit R-3—(Continued)

May

20 MU 4371 LA		1.35
11 7750 BKFD		7.45
12 TERRELL PNX		2.00
32181 PNX		1.45
14 LINDSEY BKFD		1.55
17 SAMMON LA		4.55
19 909J SCAR	.20	
WINETROB LA		1.80
20 GARDNAR SELMA		2.15
REECE MTCA		.60
BRETHRICK LA		2.70
21 7411 OKDL		.75
JOCK SELMA		1.25
24 BURNS BKFD		1.55
BAGLEY SCAR		.25
28 TERRELL PNX		3.75
BERRYBILL MDO		.65

July

1 REIS MTCA		.75
REICH MTCA		1.05
BEIRGHILL MDO		.65
LAUFER CINC		11.75
2 909J SCAR	.20	
GRUNSKY TRLK		.95
KENREID PNX		6.55

Terms n/c

Amt. Disc.

Extension DA 7-23

Bill Check H.O. 7/23/46

Defendant's Exhibit R-3—(Continued)

B/C Audit GGH 7/23

O.K. for Payment J. McH Bigler.

PL. EX. 10 N ID. 10/22/47. [844]

Copy of Vendor's Bill

Vendor Pacific Tel. & Tel. Co.

June 11, 1946

444 Bush St.

San Francisco, Calif.

Shipper.....

.....

Consignee Schenley Distilleries

.....

.....

Invoice #YU 0473

Purchase Order #

Terms

F.O.B.

Freight Bill No.

Waybill No.

Car No.

Description	Quantity		Amount	
	..... Weight	Rate	Prepaid	Collect
5/13	Stone Napa .....		.40	
	“ “ .....		.40	
	Perlman L A		3.50	
5/14	909 S Car .....	.20		
	Perlman L A		3.50	
5/15	Colton 196		2.75	
	AN 0145 LA		1.35	
	xWhipple LA		1.80	

Defendant's Exhibit R-3—(Continued)

5/16	Linkstrom Selma	1.25
5/20	Beneamen Wash DC	3.50
	Morrison " "	4.70
	xWhipple LA	2.70
5/22	Balzer Cincinnati	6.35
	xWhipple LA	3.15
5/23	Bernstein PNX	3.75
5/28	xBalzer Cincinnati	5.75
	Morrison Wash	6.50
	Bahman S Car. . . . .	.25
	Harrigan Selma	2.40
	" "	2.90
	xWhipple LA	3.85
5/29	Shasmas Frs	5.05
	Morrison Wash DC	3.50
5/31	Chalini ELK . . . . .	.60
	Nipchild ST HLN	1.00
	Vandorn TRLK . . . . .	.75
	xWhipple LA	3.50
	Morrison Wash DC	4.70
6/3	909 S.Car. . . . .	.20
	" " . . . . .	.20
	xWhipple LA	5.25
	Berg LVMR . . . . .	.40
	Raymond LA	9.45
6/3	Baglin S Car. . . . .	.25
6/4	Perlman LA	4.90
	AN 12111 LA	1.80
	Reis MTC . . . . .	.60
	Lausmon OKDL	1.15
	Amenta BKFD	1.96

Defendant's Exhibit R-3—(Continued)

	Harnta BKF	1.95	
	Palmer NY	3.50	
6/5	xBalzer Cincinnati	9.95	
	Perlman LA	3.85	
	Amenta BKFD	3.65	
	Reise MTCA	1.35	
6/7	44219 S MTO	.15	
	909 S CAR	.20	
	“ “ “	.20	
	“ “ “	.20	
	77506 BkKFD	1.55	
	Lingstrom Selma	2.15	
	“ “	3.40	
	Amenta Shafter	2.75	
6/10	Reise MTCA	.90	
	1426 LA	3.45	
<hr/>			
Total	.....	1.35	144.05
Tax	.....	.20	36.01
Total Carried to Bill		.....	\$181.61

Pl. Ex 11-N for Ideal

10/22/47

1 U S

Wednesday, June 5, 1946

R.T.H. Called about purchase of Argentine Glucose. Assigned to G. E. Baglin for immediate attention.

Thursday, June 6, 1946

R.T.H. called. I called R.H.B. re glucose Wired Many Blanc.

Defendant's Exhibit R-3—(Continued)

I called J.B.D. * * *. He called back * * *.

I called Whipple and told him that I was calling for Schenley to advise him that Schenley would not enter into contract with Engrow for purchase of glucose, etc.

Friday, June 7, 1946

Called R.T.H. Sent telegram to Whipple re glucose.

May 20, 1946

Harold A. Whipple Company
316 Commercial Street
Los Angeles 12, California

Dear Mr. Whipple:

This will confirm our telephone conversation of today on the subject of Argentine glucose.

We are interested in purchasing up to 1,000 tons. Shipments to commence May-1946 (if possible at this date)—50 tons; June through September—100 tons a month; October and November—275 tons a month. If your other prospective buyer does not take the 300 tons, we would like the opportunity to purchase this quantity in addition to the 1,000 tons.

It is understood that we will be purchasing by letter of credit direct from the Argentine shipper, cost to us not to exceed 22.3 cents a pound in wood barrels laid down, taxpaid, Pacific Coast port. It is further understood the glucose is crystal-clear obtained by incomplete hydrolysis of cornstarch, 43 to 45 Baume, with a balling of 81.8 upwards.

Just as soon as you receive a reply to your cable

Defendant's Exhibit R-3—(Continued)
to the shipper, which we understand will be by
Wednesday of this week, you will phone this office
and advise us that the shipping schedule reflected
above can be met.

We will be expecting information from you which
will enable us to issue our purchase order and cov-
ering letter of credit. Thank you very kindly for
the consideration you have given this matter.

Yours very truly,
SCHENLEY DISTILLERS
CORPORATION
R. H. Baglin

RHB:SR

Telephone
Mutual 4371

Cable Address
WHIPL
All Codes
(May 22 Recd)

Harold A. Whipple Co.
Importers-Exporters
316 Commercial Street
Los Angeles 12, California

May 21, 1946

Schenley Distillers Corp.
900 Battery Street
San Francisco 11
Calif.

attn Mr. R. H. Baglin

Dear Mr. Baglin:
confirming our telephone conversation of today re-

Defendant's Exhibit R-3—(Continued)

garding Argentine Glucose we quote from cable received today from our principals in Buenos Aires as follows:

“six hundred tons available price 1.375 (pesos per kilo) require twentyfive percent down payment balance confirmed credit our order delivery hundred fifty tons monthly starting July answer today will endeavor secure balance if you confirm”

signed: Engraw

after our phone conversation we have replied as follows:

“accept 600 tons one thirty seven one half shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation”

signed: Whipl

We will advise you immediately we receive their reply.

As we stated we do not feel that they are justified in asking for a cash deposit as advance payment on a deal of this sort and would have so cabled them even before discussing it with you. We do not think that this will “gum up” the deal and have every expectation that they will confirm promptly and—we hope will be able to complete the 1300 tons for delivery in the last $\frac{1}{4}$ of the year.

Defendant's Exhibit R-3—(Continued)
to confirm the figures which we gave you:

The export exchange rate on Argentine pesos is
U\$100.00—335.82 pesos or US \$0.29778 per peso at
pesos 1.375 per kilogram—US\$ 0.4094575 per kg.
—\$0.18573 pre lb. (1 kg—2.2046 lb) freight rate
is \$25 per 40 cu ft—the barrels contain slightly less
than 15 cu ft with a net content of 660 lbs approxi-
mately

this will give an equivalent of

approximately	\$0.0142 per lb.
insurance 1½% .30c per 100 lbs .....	.0030
duty @ 2c per lb. ....	.02

giving a landed cost est. 22.293 per lb.

The letter of credit should be opened in favor of
Cia. Engraw Comercial&Industrial .SA

San Martin 329 Buenos Aires

through the First National Bank of Boston
Buenos Aires
by cable

covering the full amount in pesos at 1.375 pesos
per kilo net FOB Steamer Buenos Aires expi-
ration Oct 30th 1946 or as confirmed

(Quotations are subject to immediate acceptance
and change without notice. All agreements are sub-
ject to the contingencies of strikes, transportation
delays, government restrictions and other causes
beyond our control. Clerical errors subject to
correction.)

Defendant's Exhibit R-3—(Continued)

We trust that the forgoing is clear to you and that you can arrange your credit to Cia Engraw as soon as we advise you that we have their final confirmation of the sale.

Confirming our earlier conversation on this subject Cia Engraw has indicated that they will be in a position after Jan 1st to furnish from 300 to 500 tons monthly at the then prevailing market for glucose and we would appreciate your informing us if you would care to book this production for 1947?

As to quality this glucose is pure corn syrup, crystal clear, testing 43 to 45 Baume . we anticipate receiving a small sample by airexpress in a few days and will forward it on to you when received. Further we suggest that documents to accompany drafts under letter of credit should include a certificate of analysis as well as a certificate of inspection of the cooperage at time of loading, for insurance purposes.

Thanking you for your cordial cooperation in this matter and assuring you of our endeavors that this deal shall work out satisfactorily for all concerned, we beg to remain

yours very truly,

Harold A. Whipple Co.

By /s/ Harold A. Whipple

Defendant's Exhibit R-3—(Continued)

Telephone

Cable Address

MUtual 4371

WHIPL

All Codes

(May 24 Reed)

Harold A. Whipple Co.

Importers-Exporters

316 Commercial Street

Los Angeles 12, California

May 23, 1946

Schenley Distillers Corp

900 Battery Street

San Francisco Calif

attn Mr. Baglin

Dear Mr. Baglin:

Confirming our telephone conversation of this morning we quote the cablegrams received from Engraw in Buenos Aires as follows:

NLT Whipl 5-22

Acting on your cable twentyfirst have completed firm purchases for account Schenley Distillers elevenhundred thirtyfive tons stop your use night letter lost julyaugust deliveries offered are working on this stop have closed June delivery fifty tons July sixty augustsept Twohundred september onehundredfifty october twoseventyfive november twohundred december twohundred stop as contract is in argentine pesos assume purchaser is covering forward exchange more details tomorrow."

Signed: Engraw.

LC Whipl 5-23

Defendant's Exhibit R-3—(Continued)

Urgent arrange immediately credit our order to cover sixhundred tons stop ask americanbank cable First Boston here so can meet requirement one supply source market today up five cents."

Signed: Engraw. [859]

You will understand they confirm actual purchase for your account of 1135 metric tons of glucose in accordance with shipping schedule given. That they have committed their personal credit to the suppliers pending receipt of your letter of credit and that they require your credit urgently at the earliest possible moment to satisfy one of their sources of supply who demanded a 25% deposit to hold the lot for you.

Will you please ask your New York office to cable the credit as quickly as possible instead of air-mailing same? This is particularly important as the next boat starts loading about the 29th and will sail on June 9.

Your credit should call for a total of 1145 metric tons approx. before December 31st, allowing partial shipments, and your purchase order should show the shipping schedule given "or more." We have cabled them again tonight asking them to try to improve the June July deliveries.

We await your confirming letter which you stated is in the mail today. Thank you for your cooperation.

Yours sincerely,

HAROLD A. WHIPPLE CO.,

/s/ HAROLD A. WHIPPLE.

Defendant's Exhibit R-3—(Continued)

Quotations are subject to immediate acceptance and change without notice. All agreements are subject to the contingencies of strikes, transportation delays, government restrictions and other causes beyond our control. Clerical errors subject to correction. [860]

Western Union (55) DX

A. N. Williams, President

Symbols:

DL—Day Letter.

NL—Night Letter.

LC—Deferred Cable.

NLT—Cable Night Letter Ship Radiogram.

Class of Service:

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time at point of destination.

May 27 PM 2 11

NE60 LG Ser PD-WUX New York NY 27 155P

J. B. Donnelly-Schenley Distilleries Inc.

900 Battery St. Sfran.

Please Wire Details Regarding Purchase Hundred Tons Glucose Argentine. Traffic Department Can Arrange Shipment from Buenos Aires Direct

Defendant's Exhibit R-3—(Continued)

to San Francisco Steamer Sailing June 12. Please Advise.

C. W. METCALF.

(The company will appreciate suggestions from its patrons concerning its service) [861]

Western Union 1220

A. N. Williams President

1946 May 27 PM 8 32

Long FE126 NL PD=Sanfrancisco Calif 27

C W Metcalf Schenley Distillers Corp=

WUX NYK=

Retel Argentine glucose. Name of shipper Cia. Engraw Commercial & Industrial S.A. Address San Martin 329 Buenos Aires. 1135 tons have been offered for shipping dates as follows. June 50 tons July 60 tons August-September 200 tons. Additional September 150 tons. October 275 tons. November 200 tons. December 200 tons. Letter of credit in favor of shipper through First National Bank of Boston. Buenos Aires covering fall amount in pesos at 1.375 pesos per kilo net FOB steamer Buenos Aires expiration December 31, 1946. Will be away from San Francisco remainder of week. Suggest you call R H Baglin for any additional information you may require. Regards=

J B DONNALLY.

#

PL. EX. 19-N for ID.

1135 X 2240 2,542,400

10/22/47

2,542 400 X 2239=566,700,96

Defendant's Exhibit R-3—(Continued)

The company will appreciate suggestions from its patrons concerning its service [862]

Mr. I. J. Seskis

May 28th, 1946.

Carl J. Kiefer

Cincinnati

Argentine Glucose—

K-5/28-1

Joe Donally has been negotiating thru the Harold A. Whipple Co., importers and exporters acting as agents for Cia. Engraw Commercial & Industrial S.A., San Martin 329, Buenos Aires, for some Argentine glucose for use in our cordials and liquers. The price of this material at Argentina is 1.375 (pesos per kilo) or about 18.6c per pound. We wish to purchase 600 tons of this material upon acceptance of a satisfactory sample and Donnelly is checking this portion. However, before we can close the deal it will be necessary to send a letter of credit thru the First National Bank of Boston, Buenos Aires covering the full amount. For this reason it would seem to be desirable to investigate this company before making a final closing with them. I would appreciate if you would look into the standing of Engraw and advise me at your earliest convenience.

CARL J. KIEFER

CJK:DW

PL EX. 20N ID. 10/22/47 [863]

Defendant's Exhibit R-3—(Continued)

Western Union 1201

(55) D X

1946 May 28 am 9 00

A. N. Williams, President

JA62 49 SER=WUX Cincinnati Ohio 28 1147A

J B Donnelly. Schenley Distilleries Inc=

900 Battery St Sfran=

Relet to Kiefer May 23. We are checking standing of company prior to issuance of letter of credit. In meantime work out arrangement with Whipple limiting commitment to six hundred tons based on acceptance of representative sample to be submitted. Further commitments to be decided at some future date

=Chas Balzer Schenley Distilleries Inc.

Talked to Whipple and passed same on to Balzer by phone.

JB

.23 The company will appreciate suggestions from its patrons concerning its service.

PL. EX. 21N ID 10/22/47 [864]

Schenley Affiliates

Inter-Company Communication

(May 31 1946)

To	Mr. C. J. Kiefer	Date	May 29, 1946
From	C. W. Metcalf	New York Office	
Subject		File	.....

The attached is a copy of a memorandum received

Defendant's Exhibit R-3—(Continued)
from Miss Duff in the Import and Export Department regarding Cia. Engraw Commercial & Industrial S.A. Evidently, this is not a manufacturer of corn syrup but an exporting outfit. Under these circumstances I would hesitate opening an irrevocable letter of credit in their favor covering our purchase of syrup. Will call you on the telephone next Monday regarding this matter.

/s/ C W M

P. S. Since writing the above, a second report has arrived on the above company which shows that they seem to be a very good house even though they are not manufacturers of corn syrup.

CWM:MB

All orders and deliveries are subject to the terms and conditions appearing on our standard order forms and invoices. All contracts must be in writing and signed by an executive officer of the company at its home office, and only such an officer is authorized to modify or waive the provisions of any contract. [865]

Schenley Affiliates

Inter-Company Communication

To: Miss Barr Date 5/29/46
From: M. R. Duff New York Office
Subject: Cia. Engraw File
 Commercial & Indus-
 trial S. A.
 San Martin 329

Defendant's Exhibit R-3—(Continued)

Buenos Aires,
Argentina

So far, the only information I could get is as follows:

Organized in March 1945

Capitalized at 1,600,000 Argentine currency for the purpose of exporting wool, hides, live-stock by-products.

President—G. F. Berger

V. P.—Louis G. Castelli

Director—Felix McGraw

All with good reputation.

This information is one year old.

Will telephone you later today if I can get later information.

M. R. DUFF

All orders and deliveries are subject to the terms and conditions appearing on our standard order forms and invoices. All contracts must be in writing and signed by an executive officer of the company at its home office, and only such an officer is authorized to modify or waive the provisions of any contract. [866]

Schenley Affiliates

Inter-Company Communication

To: Miss Barr

Date: May 29, 1946

From: M. R. Duff

New York Office

Subject: Cia. Engraw

File

Commercial & Industrial S.A.

Defendant's Exhibit R-3—(Continued)

San Martin 329

Buenos Aires,

Argentina

The Engraw Export & Import Co. S.A., Montevideo, Uruguay bought all stock in subject firm in January 1946 for \$100,000. Their December 31, 1945 (before the made the investment in the Argentine firm) statement was as follows:

Capital	200,000	Uruguayan pesos	
		(at 55 to 60c a peso)	
Surplus	122,000	"	"
Current & total		"	"
assets	765,000	"	"
Current liabilities	113,000	"	"

In the opinion of a mercantile group, these Engraw people are one of the best in South America. Three Americans are the principals:

Mr. Berger who was formerly treasurer of Morristown, Pa. Trust Co.

Mr. McGraw is President of McGraw Wool Corporation of Pittsburgh.

Mr. J. F. Hosey is President of Energetic Worsted Corporation of Bridgeport, Pa. [867]

Two Argentines

Mr. Castelli

Mr. Iturraspi

are active in the business but not participating in the investment.

M. R. DUFF

Defendant's Exhibit R-3—(Continued)

The above information like that sent to you this morning was received by us over the telephone. M.R.D.

All orders and deliveries are subject to the terms and conditions appearing on our standard order forms and invoices. All contracts must be in writing and signed by an executive officer of the company at its home office, and only such an officer is authorized to modify or waive the provisions of any contract. [868]

Western Union (18)

A. N. Williams, Chairman of the Board.

Joseph L. Egan, President

Class of Service	Symbols
This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.	DL—Day Letter NL—Night Letter LC—Deferred Cable NLT—Cable Night Letter Ship Radiogram

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time at point of destination

JA207 25=Cincinnati Ohio 31 414P

May 31 PM 1 23

J B Donnelly=

Schenley Distilleries Inc 900 Battery St SFran=
Re Argentine Glucose. Please expedite sample air-

Defendant's Exhibit R-3—(Continued)

mailing same to Many Blanc Chicago care Mr Bayles as we can make no commitment until sample is approved=

Carl J Kiefer

*Blanc.

(Notation in script:) Spoke to Whipple. Sample is being obtained will be forwarded direct to Bayles. [869]

Western Union Western Union Western Union
Western Union

WU B38 INTL

CD Baires via All America 114/113 June 5

NLT Schenley Distillers

Cincinnati (Ohio).

Acting good faith Whipl Losangeles confirmation letter your Sanfrancisco office have contracted for 1135 tons glucose under specification crystalclear fortythree fortyfive degree baume USP stop To assure June delivery have purchased and paid for fifty tons laboratory test this lot density fifteen degrees Centigrad 1.447 dash 44 point 6 baume sotwo .027 percent crystal clear laboratory reports nocalcium all deliveries subject same testnto protect you all source same producer stop As credit was delayed obtained extension contracts because contractors satisfied Schenley purchaser now need credit immediately otherwise contractsxxxwill be cancelled with peanalties stop For refences Cain Chase National Chadsey First Boston wire credit

Defendant's Exhibit R-3—(Continued)

thru First Boston here.

ENGRAW

911A Jun 6

AIC Engraw.

Cain. [870]

Harold A. Whipple Co.

June 5, 1946

Many Blanc & Co Inc.

3414 West 48th Place

Chicago 32

Ill.

attn Mr Bayles

Dear Sir:

in accordance with request received from Mr Baglin, Schenley Distillers Corp. San Francisco, we are sending you via airmail, regestered, a small sample of Argentine Glucose which has been submitted by our principals in the Argentine as a representative sample of the glucose which they will ship to Schenley Distillers.

We trust that you will expedite the examination of this sample and render your report without delay.

yours very truly,

Harold A Whipple Co.

by.....

Harold A. Whipple

HAW/H

copy to Schenley San Francisco

2 " " Engraw

Defendant's Exhibit R-3—(Continued)

Mr Baglin

the above mentioned sample is the one mentioned in our conversation as received earlier from Engraw and which has just been returned to us by our client in the northwest. It just came in a few moments ago., and we hasten to forward it on [871] to Chicago.

In the meantime we are looking forward to receiving from you confirmation of specifications which will meet the approval of your Cincinnati office as understood in our phone conversation of this morning.

Harold A. Whipple Co. [872]

C W Metcalf
16799

Recd Cinti Jun 6/225P

Have Just Received The Following Cable From Buenos Aires Addressed To Schenley Distillers Cincinnati Quote Acting Good Faith Whipl Los-angeles Confirmation Letter Your San Francisco Office Have Contracted For 1135 Tons Glucose Under Specification Crystalclear Fortythree Forty-five Degree Baume USP Stop To Assure June Delivery Have Purchased And Paid For Fifty Tons Laboratory Test This Lot Density Fifteen Degrees Centigrad 1.447 Dash 44 Point 6 Baume Sotwo .027 Percent Crystalclear Laboratory Reports Nocalcium All Deliveries Subject Same Testn-to Protect You Allsource Same Producer Stop As Credit Was Delayed Obtained Extension Contracts Because Contractors Satisfied Schenley Purchaser

Defendant's Exhibit R-3—(Continued)

Now Need Credit Immediately Otherwise Contracts Will Be Cancelled With Penalties Stop For References Cain Chase National Chadsey First Boston Wire Credit Thru First Boston Here. Signed Engraw Unquote. Please Continue To Handle This Matter And Advise What Action Is To Be Taken.

Carl J. Kiefer. [873]

(PL. EX 28-N for Id. 10/22/47)

Western Union 1206

A. N. Williams President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

G-1508

June 7, 1948 10:50 a.m.

Harold A. Whipple Co.

316 Commercial Street

Los Angeles, California

Following Our Telephone Conversation Of Yesterday, And In Response To Your Request That Said Conversation Be Confirmed In Writing, We Advise That We Are Not Entering Into Any Agreement With Cia Engraw Comercial & Industrial SA For The Purchase Of Glucose.

Schenley Distillers Corporation

By: Jas. E. Woolsey

Assistant Secretary

Chg.

Roma Wine Co.

528 Market St.

PL. EX 31 N ID 10/22/47 [874]

Defendant's Exhibit R-3—(Continued)
 Western Union 1220

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time At point of destination.

NA 443 INTL—CD Baires Via All America

7 4/7 38

Cin—

1946 Jun 8 PM 6 10

You Received Ours Giving Specifications Of Contracts Purchased For Your Account And Laboratory Test June Shipment Glucose Stop We Believe We Are Entitled Courtesy Cable Reply Stop We Are Not Speculators And If You Dont Desire Coverage Will Liquidate But If Loss Occurs Must Protect Our Intersts Stop If Glocose Desired Please Cable Number Letter Credit Socan Proceed June Shipment Stop For Personal Reference Reuben Hays First National Cincinnati

BERGER ENGRAW..

PL EX 32 N ID 10/22/47

The Company will appreciate suggestions from its patrons concerning its service

PL. EX. 32N ID. 10/22/47 [875]

June 13, 1946

File Memorandum

Mr. Stanton of Stanton & Stanton, Wilcox Building, Los Angeles, telephone regarding the Argentine glucose matter. All he had to say was that there

Defendant's Exhibit R-3—(Continued)

were two methods under which we might proceed to get out of this commitment. Inasmuch as he did not have a firm offer of any kind, I asked him to develop that information as quickly as possible. He said that evidently Mr. Whipple did not understand what we required but that he, personally, would contact Engraw and would call us again tomorrow, Friday.

PL. EX. 34-N ID 10/22/47 [876]

Pl. Ex. 35 Id 10/22/47

Stanton & Stanton
Attorneys at Law
Suite 243-5-7 Wilcox Building
206 South Spring Street
Los Angeles, Calif.

Louis B. Stanton

M.S.

Edward B. Stanton

June 24, 1946

Schenley Distillers Corporation
Empire State Building
New York, New York
Attention Mr. Metcalf

Gentlemen:

In respect to the contract between yourselves, on the one part, and Compania Engraw Commercial & Industrial S.A. and Harold A. Whipple on the other part, for glucose to be shipped from Argentina:

Defendant's Exhibit R-3—(Continued)

We have today reviewed the entire correspondence, letters, cables and telephone conversations; with this in view, the writer today phoned to Mr. Berger at Buenos Aires, and as a result of that telephone call and our former communications, we state as follows:

The difference between the contract selling price to your corporation and the purchase price of the glucose in question—\$59,146.55

As a result of your refusal to comply with the contract, our people have suffered damages for cancellation in the sum of—31,750.00

A total damage of—90,896.55 [877]

As against this, you are entitled to 5 centavos difference between the F.A.S. and F.O.B. contract of—16,899.02

Net damage to our people to date of—
73,997.53

We wish to further advise that unless this account is settled promptly the cancellation costs will unquestionably increase, and thereby the loss to which our people have been placed will likewise increase.

You must understand that our people entered into contracts for purchase of glucose under the contract with you, in order to comply with your requirements as specified in your shipping instructions, and although we have done everything in our power to minimize the loss, the figure as stated of

Defendant's Exhibit R-3—(Continued)

\$31,750. is our least cost in case of present cancellation.

I understand that there is every expectation that the market will change so as to increase this loss. Please let us know immediately as to your disposition so that we can be advised as to further procedure.

Yours respectfully,

/s/ LOUIS B. STANTON

cc to your San Francisco office

lbs 1 [878]

Pl Ex 36 Id 10/22/47

M.S.

June 26, 1946

Mr. L. Stanton
Stanton & Stanton
Wilcox Building
Los Angeles, Cal.

Dear Mr. Stanton:

We have your letter of June 24, which refers to a contract between this company and Cia Engraw Commercial & Industrial, S. A. and Harold A. Whipple for glucose to be shipped from Argentina.

As we have informed you on the telephone, there is no such contract in existence.

Very truly yours,

SCHENLEY DISTILLERS
CORPORATION

C. W. Metcalf

CWM:MB [879]

Defendant's Exhibit R-3—(Continued)

All America Cables and Radio

Subsidiary of

American Cable and Radio Corporation

Largest American owned international telegraph system providing worldwide service by cable and radio.

Commercial Cables (Insignia) Mackay Radio

All America Cables and Radio

Warren Lee Pierson

67 Broad Street,

President

New York

The following message was received "Via All America"

Del 421 Jun1546

Q BSDE111/RJ1329 XY

Baires 22 14 SG

764

L C Schenley Distillers

NYK

Accordance Your Cable And To Eliminate Confusion Are Cabling Whipple Extend Uncancelable Commitments And Amount Liquidation Damages

ENGRAW

767

Ex 41-N Ident. 10/22/47 INS [880]

Western Union 1211

A. N. Williams President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

PLFF EX 42-N Id.

10/22/47 INS

Defendant's Exhibit R-3—(Continued)

Contents Phoned To Rivera.

RTH 7/12/46

GA

WU E43 Intl N Buenosaires Via WUcables 14/13

Jul 12 0940

L C Metcalf Schenley

Distillers NYK (350 Fifth Ave)

20-0/0 Lettercredit Margin Acceptable For Liqui-
dation Program

ENGRW

925A.

20-0/0. . [881]

Compania

Engraw

Comercial E Industrial S. A.

Buenos Aires, R. Argentina

San Martin 329—3.0 Cable Address, ENGRW

U.T. 31—8311 Pl. Ex. 43-N Ident

T.T. 387 10/22/47 INS

September 18, 1946

Ralph Heymsfeld, Esq.

Schenley Distillers Corp.

350 Fifth Avenue

New York 1, New York

Dear Sir:

This is to notify you that the suppliers with
whom we contracted for the 1135 tons of glucose
which we bought for your Company have finally
refused to accept cancellation of the contracts. We

Defendant's Exhibit R-3—(Continued)
are, therefore, proceeding to sell the glucose at best prices obtainable and will, of course, look to you for payment to us of the difference between the prices thus obtained and the price at which you contracted to purchase the same.

Very truly yours,

COMPANIA ENGRAW
COMERCIAL
E INDUSTRIAL S. A.

By /s/ G. F. BERGER
G. Fred Berger
President

GFB-gem

Registered Mail [882]

G. Fred Berger
Room 1807 (co 3318)
Hotel New Yorker
New York 1, N. Y.

Return Receipt Requested

Registered No. 380516

RALPH HEYMSFELD, Esq.
Schenley Distillers Corp.
350 Fifth Avenue
New York 1, New York

Registered

Return Receipt Requested

PL. EX. 43N ID 10/22/47

Rec'd 9/19/46 Thurs. 1135 a.m. [883]

Defendant's Exhibit R-3—(Continued)

Pl. Ex 44-N Id 10/22/47 INS

Schenley Distillers Corporation

September 29, 1946

Compania Engraw

Comercial E Industrial S.A.

San Martin 329

Buenos Aires

R. Argentina

Dear Sirs:

Your letter of September eighteenth has been received and in reply we beg to advise that the statement in your letter that you bought glucose for our Company is incorrect and that, as you have been previously and repeatedly advised, we have no obligation to you in the matter.

Yours very truly,

SCHENLEY DISTILLERS

CORPORATION

Ralph T. Heymsfeld

.....

Ralph T. Heymsfeld

CC Mr. C. Fred Berger

Room 1807

Hotel New Yorker

New York, N. Y. [884]

Defendant's Exhibit R-3—(Continued)

The undersigned declares that the article described on the other side was duly delivered on , 19.....

Signature¹

Postmark of the office of destination
of the addressee:

of the agent
of the office
of destination

.....

/s/ JOSE RUMJAY

.....

¹This receipt must be signed by the addressee, or, if the regulations of the country of destination so provide, by the agent of the office of destination, and returned by the first mail direct to the sender.

5-11654

Form 3811

Rev. 1-4-40

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. /s/ G. BERGER

(Signature or name of addressee)

2. /s/ SALMER

(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Defendant's Exhibit R-3—(Continued)

Date Of Delivery 9-21, 1946

U. S. Government Printing Office 16—12421

PL. EX. 44-N ID 10/22/47 [885]

(Pl. Ex 45-N Id. 10/22/47)

Compania

Engraw

Domercial E Industrial S.A.

Buenos Aires, R. Argentina

San Martin 329-3°

Cable Address:

U.T. 34-9344

ENGRAW

T.T. 387

September 20, 1946

Ralph Heymsfeld, Esq.,
Schenley Distillers Corp.,
350 Fifth Avenue,
New York 1, N. Y.

Dear Mr. Heymsfeld:

I am flying back to Buenos Aires in the morning. I regret very much our failure to come to an understanding with reference to the glucose contracts.

I wish to take this opportunity of assuring you that in cancelling our appointment for 9:30 September 18 you entirely misunderstood our motives in suggesting the first conference and the follow-up meeting which you cancelled. We had no idea at either meeting of attempting to build up our case. The facts that existed before the meeting were not and could not have been affected by the conference which we had, and could not have been affected in

Defendant's Exhibit R-3—(Continued)
any way by the meeting you cancelled. I thought
it best to confirm this to you so that there will be
no possibility of misunderstanding as to our inten-
tions.

Sincerely yours,
/s/ G. FRED BERGER.

GFB/T [886]

(Pl. Ex. 46-N Id. 10/22/47)

Law Offices
Mesirov and Leonards
1618-20 Packard Building

Harry S. Mesirov

Thomas C. Leonards

Leon I. Mesirov

Telephone:
Rittenhouse 2431

October 29, 1946

Ralph Heymsfeld, Esq.,
Schenley Distillers Corp.
350 Fifth Avenue,
New York 1, N. Y.

Dear Sir:

Referring to the letter dated September 18, 1946,
which you received from Compania Engraw Com-
mercial E Industrial S.A. to the effect that the
suppliers with whom they had contracted for the
1135 tons of glucose had finally refused to accept
cancellation of the contracts, and that Engraw was
proceeding to sell the glucose at best obtainable
prices, I beg to inform you on behalf of Engraw
that it has been unable to dispose of the glucose and

Defendant's Exhibit R-3—(Continued)

that, having resumed negotiations with the suppliers for the cancellation of the contracts, Engraw has finally offered to pay them an aggregate sum of \$78,000 for such cancellations. It now looks as though this offer will be accepted and, unless I hear from you to the contrary by return mail, I shall assume that you have no objection to the proposed settlement.

We will, of course, look to you for repayment of our loss.

Yours truly,
/s/ Harry S. Mesirov
Attorney for Compania Engraw
Commercial E Industrial S.A.

HSM:T [887]

[Envelope]:

Mesirov and Leonards

1018-20 Packard Building

(Postage)

Philadelphia 2

(Pl. Ex. 46-N Id. 10/22/47)

Registered 220588

Ralph Heymsfeld, Esq.,
Schenley Distillers Corp.,
350 Fifth Avenue,
New York 1, N.Y.

Registered Mail

Return Receipt Requested [888]

Defendant's Exhibit R-3—(Continued)

CB & DE

1. I do not wish to comit ourselves for over 600 tons on letter of credit—until we see quality.

2. Note test of 43-45 Baume—I believe the U.S. Product is much higher—please determine & if it is then we will not accept this offer.

(Pl. Ex 47-D Id. 10/22/47) [889]

All America Cables and Radio

Subsidiary of

American Cable & Radio Corporation

Largest American Owned International
telegraph system providing worldwide
service by cable and radio

Commercial Cables (Insignia) Mackay Radio

An I.T. & T. Associate An I.T. & T. Associate

Warren Lee Pierson, President

All American Cables and Radio

67 Broad Street, New York

The Following Message Was Received "Via All
America"

Del 259 Jun 30 46

ML2 NL T526 Baires 28 29

NTL C W Metcalf Schenley 350 Fifthave NY

Cable address Alvearotel Buenos Aires received
money RIO thanks

Dichter.

(Pl Ex. 49-N Id. 10/22/47.) [890]

Defendant's Exhibit R-3—(Continued)

Hand Knitting Top Dyed Single

Energetic Worsted Corporation

Manufacturers of

Worsted Knitting Yarns

Oil Skeins

Bridgeport, Montgomery County, Pa.

Phone—Norristown 4970

John J. Hosey, President August 27, 1946

(Handwritten notation:) Rie Engraw

Mr. Ralph Hymesfeld

Schenley Distillers Corporation

Empire State Building

350 Fifth Avenue

New York City

Dear Mr. Hymesfeld:

Wish to take this opportunity to thank you for promptly making yourself available for the appointment with our Mr. G. Fred Berger, President of Engraw, Buenos Aires, 2:30 P.M. Sept. 4th.

This letter will further serve to advise you of where to contact Mr. Berger during his visit to the United States. In the meantime, if you care to check with Mr. Charles Cain, Jr., Head of the Foreign Department of the Chase National Bank, we would appreciate you so doing.

Very truly yours,

ENERGETIC WORSTED

CORPORATION

/s/ JOHN J. HOSEY,

JJH:TJ

President.

(Pl. Ex. 56-N Id) (10/22/47) [891]

Defendant's Exhibit R-3—(Continued)

Engraw

Export & Import Companies

Engraw Export & Import Company S.A.

Montevideo, Uruguay

Engraw Exportadora—Importadora, Ltda.

Rio de Janeiro

Sao Paulo

Brazil

Cia. Engraw Comercial—Industrial S.A.

Buenos Aires, Argentine

August 27, 1946

(Handwritten notation: File Engraw)

Mr. Ralph Hymesfeld

Schenley Distillers Corporation

Empire State Building

350 Fifth Avenue

New York City.

Dear Mr. Hymesfeld:

As per the writer's telephone conversation with you today, this letter will confirm an appointment with our Mr. G. Fred Berger, President of Engraw, Buenos Aires, for 2:30 Wednesday afternoon, September 4th.

Thanking you for your consideration in this matter, remain

Very truly yours,

ENGRAW EXPORT & IMPORT

CO. S.A. MONTEVIDEO

/s/ JOHN J. HOSEY,

JJH:TJ

President.

(Pl. Ex. 57-N Id. 10/22/47) [892]

Defendant's Exhibit R-3—(Continued)

[Envelope]:

(3-cent postage stamp, with cancellation stamp: Buy
U.S. Saving Bonds. Ask Your Postmaster)

Engraw

Export & Import Companies

(Postmark:) Philadelphia, Pa.3

Aug. 28 1-AM 1946

Mr. Ralph Hymesfeld

Schenley Distillers Corporation

Empire State Building

350 Fifth Avenue

New York City

(Pl. Ex. 57 N Id. 10/22/47) [893]

(Pl. Ex. 58-N Id) (10/22/47)

August 27, 1946

Memorandum for the file

Mr. Hosey called me on the telephone from Pennsylvania.

He stated that he had called Mr. Metcalf and that Mr. Metcalf had referred him to me.

He said that he had an investment in the Engraw Company in Buenos Aires; that if I checked him with the Chase National Bank in New York I would find out that he was a responsible person; that he understood that there was a controversy between Schenley and Engraw concerning some glucose and he would appreciate being told by me what Schenley's position was in the matter.

I asked Mr. Hosey why he could not get the facts

Defendant's Exhibit R-3—(Continued)

from Mr. Berger and Mr. Hosey stated that he was having considerable difficulty in getting the facts from Mr. Berger and in understanding the transaction.

I told Mr. Hosey that Engraw had purchased some glucose and claimed to have a contract to sell the glucose to Schenley; that Schenley had never made a contract with Engraw although one was in negotiation with a man named Whipple in Los Angeles but that no contract had ever been concluded with Whipple or with Engraw.

I told him that we had received a letter claiming very [894] substantial damages but that I was at a loss to understand how Engraw had been damaged since Engraw had informed our representative that if Schenley would put up a letter of credit it would enable Engraw to conclude its purchase and then liquidate the glucose without loss. Mr. Hosey stated that he could not understand why a letter of credit would be needed from Schenley since Engraw had adequate funds to take care of the situation. He said in effect: "We have two or three companies down there and if there isn't enough money in the one company we have money in the other companies." Hosey then said that he thought he would have Berger come up to the United States to explain the transaction to him and he asked whether I would be willing to meet with Berger and himself. I told Hosey that as a personal courtesy to him I would be glad to meet with Mr. Berger and himself

Defendant's Exhibit R-3—(Continued)
and clarify any points on which he might be doubtful.

Mr. Hosey thanked me for my courtesy and stated again that he would appreciate my talking to the Chase National Bank about him. We agreed that we would meet on September 4th at 2:30.

R.T.H. [895]

Hand Knitting
Energetic Worsted Corporation
Manufacturers of
Worsted Knitting Yarns
Oil Skeins
Bridgeport, Montgomery County, Pa.
Phone—Norristown 4970

John J. Hosey, President

September 10, 1946.

Mr. Ralph Heymsfeld,
Schenley Distillers Corp.,
350 Fifth Avenue,
New York, N. Y.

Dear Mr. Heymsfeld:

In order to facilitate our disposal of the glucose, would like you to make available your laboratory reports on this product.

Defendant's Exhibit R-3—(Continued)

Thanking you in advance and looking forward to seeing you on the 18th, I remain

Yours sincerely,

ENERGETIC WORSTED
CORPORATION

/s/ J. L. McMANUS

J. L. McMANUS

JLM:gsj

(Pl. Ex. 60-N-Id) (10/22/47)

(Pennant:) Army E Navy [896]

Pl. Ex. 61-N Id 10/22/47

September 11, 1946

Mr. J. L. McManus,
Energetic Worsted Corporation,
Bridgeport,
Pennsylvania.

Dear Mr. McManus:

We are in receipt of your letter of September 10th.

As a personal courtesy to Mr. Hosey, who called me on the telephone and stated to me that he was financially interested in Engraw, that he did not know all the facts of the Engraw glucose situation, and that he was having difficulty in getting them from Mr. Berger, I agreed to meet with Mr. Hosey. As a matter of fact, since Engraw and Whipple had referred the matter to counsel who made a claim on us by letter dated June 24, 1946, I would under no circumstances have considered a meeting with

Defendant's Exhibit R-3—(Continued)

Mr. Hosey for any other purpose. Mr. Hosey knew at the time of our telephone conversation that Schenley did not consider itself obligated in any way in connection with any purchase of glucose which Engraw may have made, and Engraw has been aware of the fact from the outset of the controversy, having referred the matter to counsel prior to June 24th, last.

At the conclusion of our September 4th meeting, Mr. Hosey [897] stated that he felt the situation had been fully discussed but that he would like to come back again on another occasion. He also stated that he wished Mr. Berger to show me photostats of the contracts which Engraw had made for the purchase of glucose.

You will recall that I told Mr. Hosey, Mr. Berger and yourself that I was willing to meet with you again if you desired it—and we fixed September 18th as a date which would be convenient to Mr. Berger—but that it would have to be clearly understood that our meeting again was not a recognition of any obligation in the transaction or any indication that our position was unclear or that we had any interest in the liquidation of the glucose.

Your presence at the meeting of September 4th, and the statements made by Mr. Berger at that meeting—particularly this statement that Engraw did not know Schenley's position in the matter—made me doubtful as to whether the purpose of the meeting was, as Mr. Hosey had stated, to inform

Defendant's Exhibit R-3—(Continued)

Mr. Hosey of the facts, or whether its purpose was, through the medium of continued discussion with us, to endeavor to develop a claim. This doubt is now, I feel, confirmed by your letter for which I see no other possible basis.

Under the circumstances, I see no need for any further meeting on this matter. [898]

Mr. J. L. McManus

2

9/11/46

Very truly yours,

RALPH T. HEYMSFELD.

Pl. Ex. 61-N Id 10/22/47

RTH:BD [899]

September 17, 1946

Memorandum for the Files

Mr. Berger called me on the telephone to-day. He said he had been to see Mr. Jacobi and Mr. Metcalf yesterday. He said he did not know until this morning about the interchange of correspondence which I had had with Mr. McManus. He said he was surprised at Mr. McManus' having written me because he (Berger) had the information which Mr. McManus was requesting of me. He said he would like to meet with me to-morrow and that if I desired I could write a letter or have a letter written for him that the meeting would be without prejudice to the rights of either side.

I told Mr. Berger that I saw no need for further meetings on the subject, that so far as I could see there was nothing he could say to me that would change our position, and that I was sure there was

Defendant's Exhibit R-3—(Continued)

nothing that I could say to him. Berger said that if that was my position there was nothing he could do about it but that he would like to meet again. I told him that I could see no purpose to be served by a meeting.

R.T.H.

Pl Ex 62-N Id 10/22/47

Ree [900]

(Please insert This End in Slot of Automatic Telegraph with Message facing outward)

(When placing this telegram in Automatic Telegraph please observe directions shown on the cover)

Western Union

A. N. Williams, President

Send the following telegram, subject to the terms on back hereof, which are hereby agreed to

Number Check Charge to the Account Of Place
Date Time Filed

To New York, N.Y., June 11, 1948

Engraw Commercial & Industrial, S.A.

San Martin 329

Buenos Aires

Argentina

Replying your cable: Our negotiations have been carried on with Whipple Los Angeles who has been kept fully informed of our position. Regret exceedingly confused situation which has developed and suggest you advise me Schenley New York of ex-

Defendant's Exhibit R-3—(Continued)
tent of your uncancellable commitments. Also telephoning Whipple to-day.

Metcalf

Distillers

RTH:DMS

Please Write or Type Message Plainly within the border—use black ink or pencil—do not fold. [901]

San Martin 329

3er Piso

Buenos Aires

(Argentina)

U.T. 31—8311

T.T. 387

Compania Engraw

Commercial E Industrial, S.A.

Inter-Office Communication

From—Mr. G. Fred Berger

To—Mr. E. R. Dichter

Buenos Aires, August 2, 1946.

Subject: Glucose Contracts.

After numerous cables during April and May covering the subject of the sale of glucose thru Mr. Whipple in Los Angeles, we finally received a telegram under date of May 20th accepting for parties then unknown to us, an offer for 1300 tons which we had made on April 24th and May 9th.

We immediately replied advising Whipple that it was impossible to hold offers firm in a market for glucose such as this has been.

On May 21st, we advised Whipple by L.C. that

Defendant's Exhibit R-3—(Continued)

we had available, subject to prior sale, 600 tons at Arg. Pesos \$1.30 per kilo and outlined conditions of payment which included 25% deposit in cash and advised him also that we would endeavor to secure an additional amount up to the 1300 tons if he confirmed the price offered in this telegram, i.e. A.P. \$1.30. [902]

On the 22nd of May, we received a telegram from Mr. Whipple, accepting the 600 tons at \$1.30 and offering to accept the balance of the 1300 tons at the same price. In this cable he also advised us that Schenley was the purchaser and would open credit for the entire amount but without a cash deposit which had been requested in our telegram of May 21st, according to the requirement of the supplier.

Under the circumstances and knowing that Schenley was the purchaser, we took the steps necessary to obtain as much of the balance at the same price as possible (our price being \$1.20 F.A.S. and our offer thru Whipple being at \$1.30 F.O.B. so that we had a F.A.S. F.O.B. cost of approximately five centavos, leaving a net to us of five centavos on our F.O.B. offer of \$1.30, subject of course, to special storage charges if deliveries did not coincide with steamer availability) and the suppliers now knowing Schenley as the purchaser dropped the requirement for a cash deposit requiring only the normal opening of the letter of credit.

Under date of May 22nd, we sent an N.L.T. advising Mr. Whipple that we had made the necessary

Defendant's Exhibit R-3—(Continued)
arrangements for 1135 tons to be shipped as follows:

June	50 tons
July	60 "
August-September	200 "
September	150 "
October	275 "
November	200 "
December	200 "

Contracts to cover this, were signed as follows:

600 tons	May 23rd
60 "	" 22nd
200 "	" 23rd
75 "	" 24th
150 "	" 22nd
50 "	" 27th

Under date of May 23rd, 1946, your Mr. J. B. Donnelly at your San Francisco office, wrote to Whipple starting his letter "this letter will confirm our telephone conversation and your letter of May 21st" the acceptance being the original 600 tons mentioned earlier in this letter. However, as a P.S. to this letter, Mr. Donnelly added "since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows"; this shipping schedule is the same as we outlined in our telegram of May 22nd so that undoubtedly the body of his letter was dictated some time earlier

Defendant's Exhibit R-3—(Continued)

than the P.S. tho the entire letter was dated May 23rd.

I have mentioned these dates for the single reason that apparently there seems to be some doubt expressed [904] as to the order in which these contracts were made. We closed them after receiving Whipple's instructions that the sale had been made to Schenley and our advice to Mr. Whipple under date of May 22nd, via N.L.T. so stated, "acting on your cable 21st, have completed firm purchases for account Schenley Distilleries 1135 tons stop" and then we added the shipping schedule which Mr. Whipple must have received under day of May 23rd.

Mr. Donnelly confirms the acceptance of this offer, his letter being dated May 23rd but please note that Mr. Donnelly's letter of May 23rd confirms a telephone conversation and also Mr. Whipple's letter of May 21st. Mr. Whipple wired us on the 21st, via night letter, which we received the morning of the 22nd, advising us of the approval of the purchase of the entire amount up to 1300 tons and that Schenley would open their credit for the entire amount.

Accordingly, the question of the timing and dating of contracts appears to be one of whether or not there is good faith all around.

It is obvious that we acted in the completion of these contracts only on the strength of our dependence on the fact that this purchase was being made

Defendant's Exhibit R-3—(Continued)

for Schenley of whose credit I am fully familiar as a former banker.

Without attempting to enter into a controversy it would seem that if the present opinion is that we purchased [905] without authority from Schenley, then it seems only fair to point out that in Mr. Donnelly's letter to Mr. Whipple, he in turn, in his P.S., acknowledged and accepted "the offer of Cia. Engraw Comercial e Industrial S.A. of 1135 tons with a shipping schedule as follows" that shipping schedule having been sent by us to Whipple in our N.L.T. of May 22nd so that obviously there was an offer and an acceptance if there was no purchase for account of Schenley.

Under date of June 4th, we received the first telegram from Whipple advising us that apparently something had gone amiss with the contracts, the objection at that time seeming to be based on a required analysis of the glucose.

We immediately advised Whipple of the analysis of the purchase we had made and also advised that our purchase had been made within the requirement of 43-45 Baume U.S.P.

Then, on the 5th of June, I wired Schenley at Cincinnati (Mr. Whipple's wire noted Cincinnati headquarters were refusing to authorize the credit) quoting to them the purchases we have made and the analysis of the test of the spot purchase we had already made in order to be certain to cover their requirements advising them at the same time that

Defendant's Exhibit R-3—(Continued)

each delivery would be subject to a similar test for their protection.

Under date of June 6th, Mr. Whipple advised us that he had obtained a part of an earlier sample we had sent [906] him and forwarded this to the Schenley laboratory in Chicago.

Under date of June 8th, I sent a second wire to Cincinnati asking for a reply and under date of June 12th, we received an N.L.T. from Mr. Metcalf regretting the confused situation which had developed and suggesting that we advise him at New York of the extent of the uncancellable commitments.

After the exchange of various other telegrams under date of June 14th, I wired Schenley of New York that in order to eliminate further confusion, we were cabling Whipple the extent of uncancellable commitments and the amount of liquidation damages, having ascertained at this time that we could cancel the largest contract for a ten centavos per kilo payment.

Mr. Richter then reached Buenos Aires and made contact with us and as a result we sent a joint cable to Mr. Metcalf under date of July 8th, outlining in effect that it would cost approximately U\$S 45,000.— to cancel but if a letter of credit was opened (a 20% requirement of the total was later arranged) the cancellation penalty of U\$S 30,000— would be eliminated and this action would also provide the time for orderly liquidation over the contract period which is the balance of 1946.

Defendant's Exhibit R-3—(Continued)

We also expressed our belief that there need be [907] no loss in connection with the balance of the contract for if we act as the agent for Schenley to liquidate the contracts, we believe that unless something untoward and drastic were to happen, we should be able to liquidate the contracts without loss to anyone.

We also took up the matter by cable with Mr. Whipple in order to ascertain the minimum amount of commission for which he would settle and he has left the matter in our hands.

Later telephone conversations with Mr. Metcalf disclosed that apparently he was satisfied to leave the further decision in connection with liquidation or cancellation in our hands together with Dr. Victor Goytia, the Argentine member of the firm Momen, Freeman and Goytia.

We discussed this matter with Dr. Goytia who exchanged cables with his New York office but during Mr. Metcalf's absence, apparently the legal department chose to take a stand different than that taken by Mr. Metcalf and the situation then became complicated.

As of the end of July, it became necessary for us to assume that Schenley would wish to liquidate (which liquidation Messrs. Dichter, Goytia and Berger had jointly recommended) and in order not to be in violation of the contracts we had entered into for account of Schenley, we picked up a further 160 tons of glucose so [908] that we now

Defendant's Exhibit R-3—(Continued)

have approximately Arg. Pesos \$ 250.000— of our funds involved without requiring any advances up to this time.

But the major contractor is now pushing us for a decision as to whether we are cancelling or liquidating (and he is in a position to do so for there has been not deposited the required Schenley credit for 20% of the total contract) and it will be necessary for us to give him an answer shortly.

We personally cannot cancel without violating the contracts into which we entered for account of Schenley, and if we violate them—they having been registered with the Chamber of Commerce,—we might just as well go out of business.

On the other hand, based on our funds already involved in taking up the July commitments (and there are 300 tons available in August) we are not in a position to go forward without a complete agreement with Schenley either to liquidate or to cancel.

To summarize, on the receipt of knowledge that the purchaser of the glucose in question was Schenley, we were able to eliminate the requirement for a cash deposit and were able to complete arrangements for the purchase of 1135 tons on a delivery schedule outlined in our N.L.T. of May 22nd which Mr. Whipple must have relayed to Mr. Donnelly who [909] acknowledged and confirmed Schenley's acceptance of our offer, including in his acknowledgment the schedule of shipments which is the

Defendant's Exhibit R-3—(Continued)

same schedule we outlined in our N.L.T. of the night before.

Therefore, if it were to be a question of whether or not we purchased before Schenley confirmed (and this we did not do until we knew that Schenley was the purchaser) the offsetting question seems to be that the information we outlined in our N.L.T. of May 22nd had definitely to be relayed by Mr. Whipple to Mr. Donnelly or he would not have been in a position to acknowledge and confirm the purchases and to further outline the shipping schedules which were for the first time mentioned in our N.L.T. of May 22nd.

So, it would seem that we either purchased for account of Schenley or Schenley's representative completed an acceptance of our offer—it does not seem possible that both actions can be contended.

Assuming for the sake of this memorandum, that Schenley admits either legal or moral responsibility, then the joint recommendation of Messrs. Goytia, Dichter and the writer is that we liquidate the contracts to eliminate both the cancellation cost and any possible reflection on either Schenley or Engraw for not fulfilling the contract, in addition to which it is our belief that the liquidation can in all probability be arranged without loss to any one. [910]

Messrs. Goytia, Dichter and Berger feel that if an allowance for Whipple were made to the extent of U\$S 5,000.— plus U\$S 500.— cost, this would be entirely satisfactory to Whipple.

Defendant's Exhibit R-3—(Continued)

To further summarize, the cable which Messrs. Dichter and Berger sent to Mr. Metcalf under date of July 8th and added to it our suggested settlement for Whipple, the summarization would be as follows:

Local cost of cancellation as outlined in telegram—U\$S 45.000.—

Whipple's commission and expense allowance—U\$S 5.500.—

Total cost if cancellation is carried out—U\$S 50.500.—

If the recommended liquidation is carried out immediately, the need for payment of the cancellation fee is eliminated which reduces the cost by—U\$S 30.000.—

Net cost assuming that the contracts cannot be liquidated at better than 1.20—U\$S 20.500.—

In view of the fact that the government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 1.23/1.25 but we already have information from our broker of a large offer pending from the United States at 1.31 just as soon as export licenses are granted.

So, if it were not for this delay in the issuance of the export permits, I believe we could continue liquidation if we had nothing more than the 20% letter of credit pledged [911] to meet the contract requirements with the main supplier.

Defendant's Exhibit R-3—(Continued)

It is estimated that the export licenses should be coming thru shortly and under the circumstances we cannot help but feel that the major portion, if not all of the U\$S 20.500.— shown above as the net cost of liquidation will disappear as contracts are liquidated between now and the end of the contract period which is December 31, 1946.

Accordingly, we are most hopeful that Mr. Metcalf will agree to the suggested program of liquidation and will therefore arrange to have the letter of credit deposited and authorize us to proceed with the liquidation taking such steps as may be necessary to carry it thru successfully in accordance with the program already outlined by Messrs. Goytia, Dichter and Berger.

CIA. ENGRAW COMERCIAL
E INDUSTRIAL S.A.

G. FRED BERGER,
President.

GFB:MBF

(Pl. 64 N). [912]

DEFENDANT'S EXHIBIT T

Bronson, Bronson & McKinnon

1500 Mills Tower

San Francisco 4, California

GAirfield 1-7200

Attorneys for Defendant

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E IN-
DUSTRIAL S.A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,

Defendant.

COMMISSION TO TAKE DEPOSITIONS
ON WRITTEN INTERROGATORIES

The President of the United States of America:

To Any Consul, Vice-Consul, or Consular Agent
of the United States of America, residing in the
City of Buenos Aires, Republic of Argentina, or
to an Notary Public duly authorized under the laws
of the Republic of Argentina to administer oaths,
Greetings:

Whereas it appears to the Judge of the above
entitled Court that there are located within the City

Defendant's Exhibit T—(Continued)
of Buenos Aires, [913] Republic of Argentina, and
at the addresses set opposite their respective names,
each and all of the hereinafter named witnesses,
to-wit:

Dr. Mario Robiola, Reconquista 336, Second
Floor;

Dr. Eduardo Martinex Carranza, Reconquista
336, Second Floor;

Dr. Adolfo Magdalena, Lavelle 710;

and that each and all of said persons are material
witnesses in a certain action now pending in said
Court between the above named parties, we, in con-
fidence of your prudence, competence and fidelity,
have appointed, and by these presents do appoint
you a Commissioner to take the depositions of said
witnesses, and therefore we authorize and empower
you at certain dates and places to be by you for that
purpose appointed, diligently to examine each of
said witnesses in answer to the direct interroga-
tories and cross-interrogatories annexed to this
Commission, and upon the oath of each of said wit-
nesses first taken before you, which oath you are
hereby authorized to administer, and to cause the
said examination of each of the said witnesses to
be reduced to writing, and to cause the same to be
read to or by said several witnesses so deposing
and to be subscribed by each of said witnesses and
then to certify under your seal and signature and
make return thereof annexed to this Commission,
to the Clerk of the above entitled Court at the

Defendant's Exhibit T—(Continued)

Federal Building in the City [914] of Los Angeles, County of Los Angeles, State of California, United States of America, with all convenient speed, enclosed in a sealed envelope directed to said Clerk and forwarded to him by the usual channels of conveyance for mail.

Witness the Honorable Leon R. Yankwich, District Judge of the United States, this 13 day of April, 1948, and in the one hundred seventy-second year of the Independence of the United States of America.

EDMUND L. SMITH, Clerk

By /s/ EDWARD F. DREW,

Deputy Clerk.

Interrogatories numbered one to fourteen, inclusive, to accompany commission, and to be propounded to Dr. Mario Robiola, Dr. Eduardo Martinez Carranza and Dr. Adolfo Magdalena:

1. Please state your name, age, residence and occupation.

2. Please state length of time in which, and the places where you have followed your present occupation and therein give the extent of the operations of yourself or of any firm or office with which you have been associated in such occupation or operation.

3. Please state the names of all colleges which you have attended, degrees which you have attained, date of your admission to the practice of law. If you have heretofore [915] stated that you are an

Defendant's Exhibit T—(Continued)

attorney, state any official position which you have held or do now hold in the government and the general extent of your practice or that of any office in which, or with which, you are or have been connected, particularly relating to the subject of sales of personal property.

4. The defendant Schenley Distillers Corporation has pleaded as one of its defenses that the export of glucose from the Republic of Argentina to any other country was specifically prohibited by the laws of the Republic of Argentina Numbers 12.591 and 12.831, and Article 14 of Law Number 15.591, and by regulations and orders regularly passed and made thereunder so that it would have been impossible for plaintiff to perform the contract.

Will you please attached to this deposition a copy of each one of said mentioned laws and one copy of each regulation and order regularly passed and made under said respective laws.

The said respective laws and the respective regulations and orders thereunder may be evidenced by an official publication thereof by the Argentine Government, which you can identify in your answer to this interrogatory or by a copy attested by the official having legal custody thereof, or his deputy, and accompanied by a certificate that such official has its custody. All documents must also be [916] authenticated by usual certificate of the Consul, Vice-Consul or Consular Agent of the United States stationed in Argentina. There need be only one set

Defendant's Exhibit T—(Continued)

of these documents, attached to the answer of one of the answering witnesses. Reference may be made to said set by any other witness.

Unless said respective laws, regulations or orders specifically so provide, will you please state the date when each went into effect, the period of duration of each and whether or not there have been any repeals or other termination of any one or more thereof. In this respect, please identify and attach copies of any and all laws, rules or regulations affecting the effective dates, period of duration or termination or repeal of said laws, regulations, rules or orders, the sources upon which you give your opinion and reasons therefor. Be careful to designate in your answer the particular regulations and orders, if any, passed under each particular law. Said respective laws and the respective regulations and orders thereunder may be evidenced and certified as hereinabove in this interrogatory specified.

5. Other than those above stated, were there any rules, orders, decrees or regulations, verbal or written, including, without limitation, such as were intradepartmental or internal, issued by or made by or emanating from the [917] Department of Industry and Commerce or any official thereof during the period May 1, 1946, to December 31, 1946, affecting the export of corn syrup glucose of any kind or nature whatsoever?

If so, attach a copy thereof to your answer to this deposition in form as hereinabove, in interoga-

Defendant's Exhibit T—(Continued)

tory 4 described. Or, if any such rule, order, decree or regulation was verbal, please state the terms and provisions of the same.

6. If your answer to question 5 is in the affirmative, please state the status in law of such rules, orders, decrees or regulations, verbal or written, including, without limitation, such as were intra-departmental or internal, as you have described, and state whether the same legally restricted or prohibited the issuance of export licenses for the commercial shipment of glucose during the period the same was in effect.

7. Have there been any interpretations of these or any of the laws, rules or regulations with respect to export licenses by any of the courts, executive or administrative officers of the Republic of Argentina relative to the grant or procurement of export licenses during the period of this contract?

8. In case your answer to question 7 is in the affirmative, please state fully such interpretations. If in [918] writing, attach copies thereof, certified as hereinabove, in interrogatory 4, specified.

9. The plaintiff in this action counts upon a contract, the portion of which essential for the purpose of this deposition is set forth in letter of date May 23, 1946, which is attached to the amended complaint on file, as Exhibit "A" and also hereto attached. In your professional opinion, under the provisions of the law applicable to the particular period, form and term of this contract, would it

Defendant's Exhibit T—(Continued)

have been legally impossible for plaintiff to have performed the matters and things by it to be performed at the specific times performance thereunder was due?

10. In case you have given your opinion in answer to the foregoing interrogatory herein, please state the reasons for said opinion, and if there have been any decisions in the Argentine courts thereon, please cite such decisions.

11. In your professional opinion, will you please state the difference between a law of the Republic of Argentina, a decree thereof, and regulations and orders, and therein state the reasons for your opinion.

12. In case there are found to be variances or conflicts between any of these respective regulations or orders and laws applicable thereto and under which they are made, please state that which in your professional opinion prevails, and in this respect state the reasons for such [919] opinion. In case there have been any court decisions thereon, please cite said decisions.

13. On June 7, 1946, the defendant Schenley Distillers Corporation delivered to plaintiff a telegram stating that it would not enter into any agreement with plaintiff for purchase of glucose. In your professional opinion, under the existing laws of the Republic of Argentina, would this fact alter any opinion which you have heretofore in this deposition given?

Defendant's Exhibit T—(Continued)

14. If you have given your opinion in answer to the preceding interrogatory, please state herein the reasons for said opinion and therein cite and set forth any court decisions which you may deem applicable thereto.

Dated: March 15, 1948.

BRONSON, BRONSON &
McKINNON

EDGAR H. ROWE

Attorneys for Defendant

“EXHIBIT A”

Schenley Distillers Corporation

850-900 Battery Street

San Francisco 11, California

Telephone YUkon 0440

May 23, 1946

Harold A. Whipple Co.

316 Commercial Street

Los Angeles 12, California.

Attention: Mr. H. A. Whipple [920]

Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S.A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage

Defendant's Exhibit T—(Continued)

containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Comercial & Industrial S.A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1946, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via air mail instead of regular mail in order to speed this matter.

Very truly yours,

SCHENLEY DISTILLERS
CORPORATION

/s/ J. B. DONNELLY
J. B. DONNELLY

JBD:LP

P.S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial [921] S.A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; Sept.—150; October—275; November—200; December—200. The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.

Defendant's Exhibit T—(Continued)

Stanton & Stanton

740 South Broadway

Suite 1004-09

Los Angeles 14, California

Phone: TRinity 3266

Attorneys for Plaintiff

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E

INDUSTRIAL S.A., a corporation,

Plaintiff,

vs.

SCHENLEY DISTILLERS CORPORATION,

a corporation,

Defendant.

CROSS-INTERROGATORIES

Cross-interrogatories to be propounded to each of the following named persons:

Dr. Mario Robiola, Dr. Eduardo Martinez Caranza and Dr. Adolfo Magdalena, at the City of Buenos Aires, Republic [922] of Argentina, before the Consul, Vice Consul or Consular Agent or Notary Public, to take the deposition of each of said witnesses on behalf of defendant in the above entitled action.

Defendant's Exhibit T—(Continued)

To Defendant's Interrogatory No. 5:

In case your answer to this interrogatory is in the affirmative, please state:

(a) The particular sources upon which you base your answer, and therein give the name and official position of anyone who informed you of any verbal or oral rule, order or regulation.

(b) Please give the specific date and place where, and the parties present, when you were informed thereof.

(c) Please give the date when such verbal or oral rule, order, decree or regulation was made, by whom it was made, what official position, if any, he had at the time of making it, the effective date thereof, and the duration thereof.

(d) Please state whether such verbal or oral regulation, rule, order or decree was made public. If so, describe in detail when and in what way.

(e) Please give the authority in any law, statute or decree of the Argentine Republic under and by which any such verbal or oral order, rule, decree or regulation is made or upon which the official relied in making it.

(f) Is there any record or minute in any office of any department of any such verbal or oral rule, order, regulation [923] or decree? If so, attached a full, true and correct copy of the whole thereof, duly certified as required under direct interrogatory No. 4, and state the particulars of how you have obtained such instrument.

Defendant's Exhibit T—(Continued)

To Defendant's Interrogatory No. 6:

(a) Are you acquainted with the provisions of Article 17 of the Civil Code of Argentina?

(b) If you are so acquainted, please quote fully the provisions of said article.

(c) If you have stated that verbal or oral decrees, rules, orders or regulations have been issued and they, in any manner, have restricted by their operation or prohibited the issuance of export licenses, or have in any respect affected the export of glucose, please give in detail each and every authority upon which you rely in the law or court decisions of any courts of the Argentine Republic which you claim support your opinion that oral or verbal rules, orders, decrees or regulations have any effect as to private or commercial shippers.

(d) If you have stated that intradepartmental or internal rules, orders, decrees or regulations issued by or made by, or emanating from the Department of Industry and Commerce or any official thereof, affected the export of glucose in any manner, please give in detail each and every authority upon which you rely in the law or court decisions in the Argentine [924] Republic which you claim support your opinion that such intradepartmental or internal rules, decrees, orders or regulations have any effect as to private or commercial shippers.

(e) Please state in detail the requirements as to publicity as to the publication of any and all orders, rules, regulations and decrees.

Defendant's Exhibit T—(Continued)

(f) In case it was established as a matter of fact that exportation of glucose was actually made in each of the months commencing with the 1st day of May, 1946, and extending to the 31st day of January, 1947, would this in any respect alter any of your opinions herein given?

(g) Would the fact of the exportation during said months show or tend to show the interpretation made by executive or administrative officers of any or all of the rules, regulations, decrees or orders, whether written, oral or verbal?

(h) In case in your answer to interrogatories Nos. 4 and 5, or either of them, you have stated that rules, regulations, orders and decrees have been made, please give a detailed answer as to which particular order, decree or regulation in your opinion operated to legally restrict or prohibit the issuance of export licenses for glucose and further state if in your opinion such ban was valid, and give the basis of authority upon which you rely in such opinion. [925]

To Defendant's Interrogatory No. 9:

(a) Will you please state the authorities or other text-writer, or court opinion upon which you base any opinion given in response to direct interrogatory No. 9.

(b) In case your answer to said defendant's direct interrogatory No. 9 is that in your opinion it would have been legally impossible for plaintiff to perform the matters and things by it to be per-

Defendant's Exhibit T—(Continued)

formed at the specific times performance thereunder was due, please state fully and in detail the grounds upon which you base your opinion and therein cite any and all decisions of the courts of Argentine or any text-writer upon which you may rely, giving the name of the case and book and page where it may be found, or name of text-writer, title of book and page or section.

General Cross-Interrogatory No. 10:

- (a) Do you know of a Boletin Official?
- (b) If so, where and how often is it issued?
- (c) Is it issued under authority of any law of the Argentine Republic?
- (d) If your answer to the last is in the affirmative, quote at length the specific law or decree relative to said Boletin Official with special relation to laws, rules, regulations or decrees that are required to be published therein.
- (e) In case any law, rule, regulation, order or decree is [926] not published in said Boletin Official, what is the legal status thereof under the laws and court decisions of the Argentine Republic?
- (f) Specify the date of publication in the Boletin Official of each and every law, decree, order, rule or regulation to which you refer in your answer to any and all of the foregoing interrogatories and cross-interrogatories.

STANTON & STANTON

By LOUIS B. STANTON

LOUIS B. STANTON

Attorneys for Plaintiff. [927]

DEFENDANT'S EXHIBIT T-1

In the District Court of the United States for the
Southern District of California, Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S.A., a Corporation,
Plaintiff,
vs.

SCHENLEY DISTILLERS CORPORATION,
a Corporation,
Defendant.

INTERROGATORIES
and
CROSS-INTERROGATORIES

Deposition of Mario Robiola, taken before me, Fred H. Hauser, Jr., Vice Consul of the United States of America at Buenos Aires, Argentina, at 9:30 a.m. on May 10, 1948, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Mario Robiola, could not intelligently testify in the English language, and did well understand the Spanish language, one Elsa Zabala, who also well understands said Spanish language, was employed as interpreter and was sworn as follows:

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

“You do solemnly swear that you will truly and faithfully interpret the oath and questions to [928] be administered to Mario Robiola, a witness now to be examined, out of the English language into the Spanish language and that you will truly and faithfully interpret the answers of the said Mario Robiola thereto, out of the Spanish into the English language.”

and said Elsa Zabala interpreted accordingly.

The answers of the witness, Mario Robiola, to said interrogatories and cross-interrogatories were taken down stenographically by Elsa Zabala, of Avenida Quintana 337, Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Mario Robiola, a witness now to be examined. So help you God.”

Mario Robiola of Callao 1375, Buenos Aires, Argentina, 45 years of age, lawyer, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

deposes and says:

Answers by Mario Robiola to Interrogatories.

To the First Interrogatory, he says:

Mario Robiola, 45 years of age, address Callao 1375, Buenos Aires, occupation lawyer.

To the Second Interrogatory, he says:

I was received as a lawyer in the city of Buenos Aires in 1925, and I am a partner in the law firm of Severgnini, Robiola and Garber, since that date, at which time this firm was established.

To the Third Interrogatory, he says:

I went to the "Colegio Sarmiento" (High School), and I was graduated as a lawyer at the "Facultad de Derecho de Buenos Aires" (Faculty of Law of Buenos Aires), where I was assistant to the Centre for Study of Legal Proceedings. I was admitted to the practice of law in August, 1925. I have not held, nor do I hold any official position. As a law firm we represent, among other firms, the Manufacturers Trust Company of New York, and have numerous contacts with the United States of America. We are connected with personal properties, especially with the Sayer Company, Inc. and with high grade Foods Products Inc.

To the Fourth Interrogatory, he says:

The export of glucose was not specifically prohibited by any of the laws referred to in the questionnaire. I attach hereto copies of laws 12591 and

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

12830, and 12983. Exhibits 1, 2, 3. Law 12831 has probably been cited in error, [930] as it has no bearing on the subject matter of this suit (it refers to the declaration of a National Holiday on August 12th.) There is no law 15591 in existence, and doubtless reference should have been made to Article 14 of law 12591. There are no copies available of Official Publications containing these laws, for which reason they have been copied and will be presented legalised.

To the Fifth Interrogatory, he says:

When war was declared Law 12591 was promulgated, which gave full powers to the Executive Power to adopt whatever measures they might consider necessary in order to regulate the cost of living. In July, 1944, the Government created the Secretariat of Industry and Commerce, and they were empowered to take direct intervention in all the existent problems of the day, including the granting of export permits, fixing of export quotas, etc. while they made a study of the situation as regards the supply of raw materials, and other articles which would affect the cost of living. As an outcome of this it was decided to investigate the glucose situation, and the Secretary of Industry and Commerce, Mr. Rolando Lagomarsine, gave a verbal order to suspend the shipments of glucose, and requested that all permits which had been granted, but not turned over yet to the exporters, be withheld, until a definite resolution had been taken. As

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

this was a verbal order and I was not present when it was given, [931] I am not able to attach a copy of the order, nor to supply the exact text, but I do know from information which has been given me, that the order was a very definite one and carried complete authority.

To the Sixth Interrogatory, he says:

The legality of this verbal order is beyond discussion: law 12591, and those laws which were later passed 12830 and 12983, gave the Executive Power complete authority to intervene in all problems concerning exportation and importation. Another matter to be considered, is that from 1943 the Argentine Republic was under the rule of a *de facto* Government, that is to say, there was no Legislative Power, and, as a consequence, all public affairs were handled by the body known as the National Executive Power, and this entity was empowered to dictate whatever measures it deemed necessary. It should be taken into account that only from 4th. June, 1946, was the Constitutional system of the country normalised. Law 12924 of 13th. January, 1947, ratified and confirmed the creation of the Secretariat of Industry and Commerce, and recognised all measures passed and adopted by this institution, therefore, the verbal order given regarding the export of glucose must be considered completely legal from all viewpoints.

To the Seventh Interrogatory, he says:

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

I do not know of any judicial questions having arisen [932] during the period referred to, regarding the granting of export licenses, but I am quite sure that in certain instances the Courts have admitted that the Executive Power is entitled to prohibit exportation of whatever product they may consider necessary.

To the Eighth Interrogatory, he says: .

This question is answered by my reply to No. 7.

To the Ninth Interrogatory, he says:

Yes. The actor could not possibly have complied with the contract as he was prohibited from so doing by the resolution passed by the Secretariat of Industry and Commerce, which went into effect 1st. May, 1946, and forbade the exportation of glucose.

To the Tenth Interrogatory, he says:

My opinion is based on Articles 513 and 514 of the Argentine Civil Code, which state (Mr. Robiola read from notes) "The debtor will not be responsible for damages and interests which may originate through lack of compliance with his obligation, when this is due to fortuitious circumstances or force majeure, that is unless the debtor should have accepted responsibility for the consequence of fortuitious circumstances, or that these should have been caused by his fault, or conditions already constituted by delay not due to fortuitious circumstances or force. [933]

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

Answers by Mario Robiola to Cross-Interrogatories.

To the First Cross-Interrogatory (to Defendant's Interrogatory No. 5) he says:

A) The information was given to me in the offices of the Secretary of Industry and Commerce, Mr. Rolando Lagomarsino, which I visited at the end of June or beginning of July, 1947. The name of the person who gave me this information is a Mr. Cofrancesco.

b.) I cannot give the exact date, I repeat it was at the end of June or beginning of July, 1947. There were other people present, but I cannot say who they were, because at the time I did not consider it necessary to document myself in this connection.

c.) Regarding the information given me, I would say I was advised that the order had been a verbal one given by Mr. Rolando Lagomarsino, in his capacity as Head of the Secretariat of Industry and Commerce, and this order was to be effective as from 1st. May, 1946, until a study had been made of the maize market, and of glucose in particular. The first resolution covering this subject was dictated 29th. August, 1946, No. 4484/46, and this was immediately followed by another resolution passed on 18th. September, 1946, No. 7499/46, copies of which I attach.

d.) I do not know in what form this order was

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

made public, however, the Export Division of the Secretariat of Industry [934] and Commerce was fully aware of the order, and as a result would not grant any export permits for the shipment of glucose during the period when this order was in effect.

e.) There is not in the Argentine Republic any special disposition which foresees the possibility of verbal resolutions, but in many cases, especially during the last few years, many verbal resolutions have been dictated and remain in effect while the definite resolutions are being studied before being finally passed.

f.) I do not know of the existence of any record of verbal orders.

To the Second Cross-Interrogatory (to Defendant's Interrogatory No. 6) he says:

a.) Yes.

b.) I quote from Article 17 of the Argentine Civil Code (Mr. Robiola quoted from a copy of this article):

“Laws cannot be derogated in their entirety or in part except by other laws. Usage, custom or practice cannot create rights except when laws refer to them.”

c.) I do not know of any decision of the Courts on this question, I wish to repeat, however, that the Secretariat of Industry and Commerce had complete authority to prohibit or in any other way to regulate the exportation of glucose or any other

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

product, so much so that any one who wished to export any product had first to obtain an export permit from [935] the Export Division of the Secretariat of Industry and Commerce. If the Secretariat of Industry and Commerce did not consider it was necessary to put this understanding in writing, this is a matter which has no connection with the validity of the order.

d.) I refer to my reply to the previous question.

e.) In accordance with Argentine legal requirements only laws must be published in the Boletín Oficial, but it is not legally required that orders or resolutions emanating from the various Ministries be also published in this manner.

f.) Only in the event that due to some exceptional circumstance the order to export had been made by some official institution, such as I.A.P.I. (Instituto Argentino de Promoción del Intercambio). It could also be the case that shipments were made after the prohibition for the export of glucose was in force, that is, 1st. May, 1946, but this would be because export permits once granted (and handed over to exporters) are valid for 180 days from date of granting.

g.) I do not think so because, as already stated, the prohibition covering the export of glucose was to remain in effect during the period that a study was being made of the market, and until a definite resolution was passed, and this was done as already mentioned in August and September, 1946.

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

h.) As already stated, the Secretariat of Industry and [936] Commerce was fully empowered to regulate all importation and exportation of the Argentine Republic, and as a direct result of this were able to prohibit the exportation of glucose. I wish to add that such resolutions were dictated, as is known in the Argentine, covering many lines of commerce.

My statements are based on the study I have made of this interrogatory.

To the Third Cross-Interrogatory (to Defendant's Interrogatory No. 9) he says:

a.) In answering No. 9, I consider that the prohibition of the export of glucose constituted a case of force majeure, and that under these conditions the contract could not have been complied with, on account of the unsurmountable obstacle which existed, that of a governmental resolution. The impossibility of compliance with a contract is the essence of fortuitious circumstances, as stated by Planiol "Elemental Treatment of Civil Law, Volume 2, No. 231, page 90; Bruzin "Essay on the idea of foreseeing", page 24 and those following; Polaco, "Obligations in Italian Civil Law", volume 1, page 333, No. 63; Bonnecase, "Supplement to theoretical and practical treatment of Civil Law; De Baudry "La Cantinerie", No. 272, page 539; Salvat "Obligations in General", page 70, No. 146; Argentine Jurisprudence, volume 13, page [937] 220.

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

To the General Cross-Interrogatory (to Defendant's Interrogatory No. 10) he says:

a.) Yes.

b.) In Buenos Aires, every working day.

c.) The Boletin Oficial was created by law 438 of the 5th. October, 1870; this law was derogated on the 15th. October, 1897, by law 697. The definite creation of the Boletin Oficial was effected on 2nd. May, 1893, by decree.

d.) The decree of 1893 stated that the Boletin Oficial would be the official organ for the publication of laws, decrees, resolutions, reports and all other data showing the state and movement of National administration. It will also publish all laws, decrees and acts of the National Executive Power which are of public character, and which will be delivered to them by the Press office of the President of the Nation, Decrees 659 of 14th. January, 1947 and 10893 of 24th. April, 1947.

e.) By publication in the Boletin Oficial it is presumed that the subject matter is known to all, but it is not imperative that all resolutions be published in the Boletin Oficial, and this is the case of many resolutions of the various Government officials and offices, but this fact of non-publication does not prevent these resolutions from being considered completely legal. The 21st. December, 1935, the Federal Chamber of the Capital dictated a sentence [938] declaring that the lack of publication of a law in the Boletin Oficial does not prevent it

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

from being valid, publication in any other organ may be considered effective. I attach a copy of this sentence. It was also declared by the Courts that the reading over the radio of a Government decree may be considered sufficient publicity, and the law is valid and in full effect.

f.) The dates of laws and the dates of their publication in the Boletin Oficial have been given in the course of my answers, whenever this information was obtainable. majeure." Article 514 "A fortuitious circumstance is one which could not have been foreseen, or if foreseen could not have been prevented."

In this case it was a fortuitious circumstance and force majeure because the Government dictated an order which prohibited the exportation of glucose. The course have considered as cases of force majeure, among others, the following.

a. The suspension of the production of a salt mine by a competent authority;

b. An order from the Executive Power forbidding the Municipality from continuing to collect a tax on silt, sand and gravel;

c. An order from the Executive Power forbidding the occupation of lands which are considered to be [939] under national jurisdiction, despite a municipal concession to the contrary.

It was finally declared that "force majeure exists when a Government forbids, during time of war,

Defendant's Exhibit T-1—(Continued)

(Deposition of Mario Robiola.)

exportation of goods by firms which are on their black list." I, therefore, consider that force majeure existed in the case of the contract referred to in Exhibit "A", and that under these circumstances, compliance with same was absolutely impossible.

To the Eleventh Interrogatory he says:

A law is passed by the Legislative Power and is then promulgated by the Executive Power. A decree is dictated only by the Executive Power. Regulations, orders and resolutions are dictated by the respective Departments, Ministries and Secretariats, and are passed in order that they may each better carry out their respective functions. The reason for my opinion is my knowledge of Argentine law.

To the Twelfth Interrogatory he says:

In the Argentine Republic this problem has been foreseen, and taken care of by Article 31 of the National Constitution which states that a law comes first, providing always that it is constitutional. There can be no conflict between a decree and a law, as whatever the Executive Power decides on the exportation or importation of products, is considered constitutional. There have been no Court decisions. [940]

To the Thirteenth Interrogatory he says:

No, because in June 1946, there was in existence the order which prohibited the exportation of glu-

Defendant's Exhibit T-1—(Continued)
(Deposition of Mario Robiola.)

cose, and on account of force majeure the contract could not be complied with.

To the Fourteenth Interrogatory, he says:

The answers I have given are based on my knowledge of Argentine law, and my experience during 23 years of law practice. Consideration should also be given to conditions prevailing in the Argentine Republic, which are well known, and, I would even say, axiomatic.

/s/ MARIO ROBIOLA

Mario Robiola

Witness

/s/ ELSA ZABALA

Elsa Zabala

Interpreter

/s/ FRED H. HAUSER JR.

Fred H. Hauser Jr.

Vice Consul of the

United States of America.

DEFENDANT'S EXHIBIT T-2

In the District Court of the United States for the
Southern District of California Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E.

INDUSTRIAL S. A., a Corporation

Plaintiff

vs.

SCHENLEY DISTILLERS CORPORATION,

a Corporation

Defendant.

INTERROGATORIES AND
CROSS-INTERROGATORIES

Deposition of Eduardo Martinez Carranza, taken before me, Fred H. Hauser, Jr. Vice Consul of the United States of America at Buenos Aires, Argentina, at 9.30 a.m. on May 11, 1948, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division in the above entitled cause.

It appearing that the witness, Eduardo Martinze Carranza, could not intelligently testify in the English language, and did well understand the Spanish language, one Elsa Zabala, who also well understands said Spanish language, was employed as interpreter and was sworn as follows:

“You do sloemnly swear that you will truly

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)

and faithfully interpret the oath and questions [942] to be administered to Eduardo Martinez Carranza a witness now to be examined, out of the English language into the Spanish language and that you will truly and faithfully interpret the answers of the said Eduardo Martinez Carranza thereto, out of the Spanish into the English language.”

and said Elsa Zabala interpreted accordingly.

The answers of the witness, Eduardo Martinez Carranza, to said interrogatories and cross-interrogatories were taken down stenographically by Elsa Zabala, of Avenida Quintana 337, Beunos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Eduardo Martinez Carranza, a witness now to be examined. So help you God.”

Eduardo Martinez Carranza of Rodriguez Pena, 1271, Buenos Aires, Argentina, 33 years of age, lawyer, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
deposes and says: [943]

ANSWERS BY EDUARDO MARTINEZ
CARRANZA TO INTERROGATORIES

To the First Interrogatory, he says:

Eduardo Martinez Carranza, 33 years of age, address Rodriguez Pena 1271, Buenos Aires, Argentina, occupation lawyer.

To the Second Interrogatory, he says:

11 years as a lawyer, 10 years as a lawyer in the city of Cordoba, and since 1947 I have exercised my profession in the city of Buenos Aires, and am associated with the firm of Severgnini, Robiola and Garber. I have dealt principally with civil and commercial matters.

To the Third Interrogatory, he says:

I followed High School course at the 'Colegio Nacional Montserrat', one of the oldest schools in the country. I followed University studies at the Law School in the city of Cordoba, where I obtained my law degree, and also a degree in Law and Social Science. I was admitted to the Bar in January 1937.

I was Deputy in the Provinde of Cordoba during 1946, and professor for Civil law at the University of Cordoba. I was also a member of the Council of the Law School in Cordoba, and also a member of the Board of Directors of the Collete for Lawyers of the Province of Cordoba, which is an official institution. This institution accords or denies, ac-

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
cording to each case, permission to lawyers to [944]
exercise their profession.

While I practiced law in Cordoba, I represented important companies of the Argentine and of the United States of America, among those of the United States I might mention Pan American Airways, Warner Brothers, Universal Pictures and other movie companies.

In Buenos Aires I am associated with the law firm of Severgnini, Robiola and Garber, who represent, among other important firms, the Manufacturers Trust Company of New York.

To the Fourth Interrogatory, he says:

Dr. Robiola has attached copies of law 12591, 12830 and 12983. Law 12591 was promulgated on 8th September, 1939, and published in the Boletin Oficial on the 11th. September, 1939, and has been in force until 3rd. June, 1946. Law decree 16216 was passed on 3rd. June, 1946, (Exhibit 4) and was in force until 23rd. August, 1946. Law 12830 was promulgated on 23rd. August, 1946, and published in the Boletin Oficial on the 16th. September, 1946, and is actually in force, with modifications made by law 12983. Law 12830 will be in force until 3rd. June, 1952. Law 12983 was sanctioned on 30th. April, 1947, and promulgated 3rd. of May, 1947; it was published on the same day in the Boletin Oficial. The laws mentioned do not specifically prohibit the exportation of glucose. Laws 12831 and 15591 have been cited by error in the questionnaire,

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

because the last mentioned law does not exist and the afore mentioned one refers to a matter [945] completely different from that under consideration, law 12831 declared a National Holiday on 12th August. As I have already stated, the laws cited and which are connected with this matter, do not specifically prohibit the exportation of glucose but do give the Executive Power full authority to restrict and prohibit the export of those products which it is considered necessary to retain in the country. The Executive Power, therefore, was the one to decide which products could be exported and which could not be exported.

By Decree 20262 of the 20th. July, 1944, which was regulated by Decree 23896 of the 3rd. October, 1945, the Secretariat of Industry and Commerce was created, and in article 6 of this last named decree, it is disposed that the complete control of importation and exportation will be handled by the Secretariat of Industry and Commerce. the decrees to which I have referred regarding the creation of the Secretariat of Industry and Commerce, have been ratified by law 12924 of the 13th. January, 1947.

According to what I have already declared, the Executive Power was empowered to regulate the exportation of products, and in this case the Executive Power delegated this authority to the Secretariat

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

of Industry and Commerce, article 14 of law 12591 reformed by decree 16216, referred to this delegation of authority to the Secretariat of Industry and Commerce. [946] In the exercise of this authority, the Secretariat of Industry and Commerce dictated a resolution, No. 5109, in which it established that in order to obtain export permits for glucose, the exporters must prove that they had delivered to the Government 1% of the production of maize, when such production corresponded to harvests up to 1945, inclusive. If the harvests were of a later date, the exporters must prove that they had obtained the maize from I.A.P.I. (Instituto Argentino Promocion Intercambio). I have not obtained a copy of this resolution, No. 5109, and merely cite the pertinent part of same.

On 29th. August, 1946, the Secretariat of Industry and Commerce dictated resolution 6926, which limited to Exhibit 5 4000 tons the exportable quota of glucose during the period 1st. June, 1946 to 30th. June 1946. On 18th. September, 1946, the Secretariat of Industry and Commerce passed resolution 7499, in which it is stated that the Exhibit 6 export of glucose will be submitted to prior permits which will be granted only when home consumption requirements have been taken care of.

According to data which I have, the Secretariat of Industry and Commerce dictated a resolution during the first part of May, 1946, prohibiting the export of glucose. This resolution, according to my

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

information, was in the form of a verbal order given by the Secretary of Industry and [947] Commerce, with the object in view of making a complete study of the market conditions in general, with particular reference to glucose, ordered all the persons working under him to refuse export permits for glucose, and to withhold permits already granted but not handed over to the exporters.

I have mentioned all the laws, decrees and resolutions of which I have knowledge, which deal with this matter. I exhibit copies of resolutions 6926 and 7499 and decree/law 16216 which, when authenticated by a Notary Public, will be attached to this deposition.

To the Fifth Interrogatory, he says:

In my reply to No. 4 I have mentioned all the laws, decrees and regulations, and all other information I have on the subject. I confirm the existence of the verbal order, to which I have referred, and although I do not know the exact text of this order because it was delivered verbally, from data which I have, it stated that no new permits should be granted, and that those granted but not turned over to exporters, should be withheld.

The order prohibiting the export of glucose was completely legal and valid. When I make this affirmation, I found my statement on the laws and decrees which I have mentioned, which delegate complete authority to the Executive Power to restrict the export of any and all products they con-

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

sider necessary. I would also draw attention to the period [1948] during which the verbal order was given, May 1946; the Argentine Republic was under the rule of a de facto Government, as a consequence of the resolution of 3rd. June, 1943, when the National Congress was dissolved. All duties of the Government, except Judicial functions, were centralised in the Executive Power, whose existence had been recognised by the Supreme Court of National Justice and by all the countries of the world, so even though in theory the legal validity of some of the measures adopted by the Executive Power could be disputed, the full efficacy of these dispositions cannot be denied. According to our constitutional system, judges may only be removed by death or through a political trial on the accusation of the Chamber of Deputies, and sentence passed by the Senate, nevertheless, during the Revolutionary Government many judges were dismissed from their office by a decree and new judges were appointed, who passed sentence on the cases submitted to them and no one has ever disputed the validity of these decisions. In the same way, the Executive Power dictated dispositions which were not in strict accordance with the law, but which were efficacious and no one has been in disagreement with them. It was quite legal for the Executive Power to deny export permits by means of verbal orders, considering the state of the country, as they were fully authorized to restrict exportation by laws and de-

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

crees to which reference [949] has already been made.

To the Seventh Interrogatory, he says:

I do not know of any decisions in this connection.

To the Eighth Interrogatory, he says:

I refer to my answer to No. 7.

To the Ninth Interrogatory, he says:

In my professional opinion, under the laws and regulations in force at that time, the contract referred to in Exhibit 'A' could not have been complied with. If the verbal order of the Secretary of Industry and Commerce which prohibited the export of glucose was posterior to the date of the contract, the contract could not have been complied with either, because this order constituted a case of fortuitious circumstances under the terms of Articles 513 and 514 of the Civil Code. If the order was anterior to the date of the contract this also could not have been complied with because the essence of the contract was the shipment of 1135 tons of glucose, which was prohibited and, therefore, the contract would be null according to article 953 of the Civil Code.

To the Tenth Interrogatory, he says:

The reasons for my foregoing opinion are found in Articles 513 and 514 of the Argentine Civil Code which says:

(Dr. Carranza read from notes)

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)

“The debtor will not be responsible for damages and interests which may originate through lack [950] of compliance with his obligation, when this is due to fortuitious circumstances or force majeure, that is unless the debtor should have accepted responsibility for the consequences of fortuitious circumstances, of that these should have been caused by his fault or conditions already constituted by delay not due to fortuitious circumstances or force majeure.”

Article 514:

“A fortuitious circumstance is one which could not have been foreseen, or if foreseen could not have been prevented.”

Fortuitious circumstances or force majeure (in our law these are synonymous are composed of two elements:

- a. objective—an act of nature such as a storm, flood etc. or human actions, strikes, etc. or an act traditionally known as ‘decision of the Prince’, that is dispositions made by the Government.
- b. subjective—circumstances not due to the fault of the debtor; in the case of which I refer this lack of fault to the debtor is clearly defined, due to the order of the Secretary of Industry and Commerce which prohibited [951] the export of glucose, the contract could not be ful-

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

filled. The order emanated from a competent authority and as a result the contract was dissolved.

Our courts register many cases of fortuitious circumstances, I cite among them:

- a. suspension of production of a salt mine by a competent authority.
- b. Prohibition by the Executive Power for concessionaires of the Municipality to continue collecting tax on silt, gravel and sand.
- c. Prohibition by the Executive Power of the occupation of lands understood to be under exclusive national jurisdiction (Jurisprudence of the Civil Courts of the Capital, volume CLI, page 251).
- d. Force majeure is said to exist in the case of the denial of authority by a Government to export merchandise during times of war, because the purchasing firms figure on the contry's list of enemy firms (see Gaceta del foro' Nov. to Dec. 1919, page 230.)

All the cases cited deal with dispositions taken by the Government which made compliance with contracts impossible. [952]

To the Eleventh Interrogatory, he says:

A law emanates from the Legislative Power, and the Executive Power acts as co-legislator and pro-

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
mulgates the law. A decree is dictated by the Executive Power, but if it is a regulating decree it must not alter the essence of the law (Article 86, 2nd. paragraph of National Constitution.) Regulations are sent out by the Departments, Ministries or Secretariats of State and cover matters concerning them.

My opinion as given is based on my knowledge of the Argentine Constitution and on laws dictated subsequently.

To the Twelfth Interrogatory, he says:

In the case of conflict, a law prevails over a decree and a decree over a regulation of a Ministry, according to Article 31 of the National Constitution. There are many cases in the Courts where a decree has been declared null and void, when such has been passed with the pretext of regulating a law, and actually modified it, see Argentine Jurisprudence 1945, volume 1, page 277, year 1944, volume 2, page 396, etc. Nevertheless with reference to the concrete case under consideration, I want to state that there is no possibility of a conflict between a decree and a law because the laws 12591 and 12830 delegated to the Executive Power full authority to decide which articles could be exported and which prohibited, so that the Executive Power when prohibiting the [953] export of glucose exercised power granted them in a fully legal manner, therefore, there can be no possible conflict.

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

To the Thirteenth Interrogatory, he says:

In my professional opinion, the fact referred to in this question does not alter my conclusions. If the verbal order to which I have referred existed, then the contract had no value, therefore, the telegram of 7th. July, 1946, is of no importance, as it only states the wish not to enter into a contract, but the prior contract was without effect. If, theoretically, it is proved that the verbal order did not exist, the telegram would still be of no importance, because the contract referred to in Exhibit 'A' would be in force, and could not be annulled by the unilateral desire of one of the parties.

To the Fourteenth Interrogatory, he says:

The reasons for my opinion are given in my answer to the foregoing question. [954]

Answers By Eduardo Martinez Carranza
To Cross-Interrogatories

To the First Cross-Interrogatory (to Defendant's Interrogatory No. 5.) he says:

a. I cannot give the name of nor the position occupied by the person who informed me that the Secretary of Industry and Commerce had issued the verbal order to which reference has been made, but I can say that in July of 1947 we received a letter in our office from Bronson, Bronson & McKinnon of

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
San Francisco, California, lawyers for the defendant in this case, in which letter, among other data, they asked us to let them know of all legal dispositions and rules existing in the Argentine Republic regarding the exportation of glucose. With this end in view, and after studying the existing laws, I went to the Import and Export Division of the Secretariat of Industry and Commerce, situated in 25 de Mayo 197 of the city of Buenos Aires, where I asked to see one of the heads of the department. I asked the person I saw to advise me of all regulations and orders dictated in the Secretariat of Industry and Commerce to regulate the export of glucose. This person was the one who informed me of the existence of resolutions 5109, 6926 and 7499, which I have already cited in my declaration, and it was also he who advised me of the existence of the verbal order, which I have already mentioned. I went three or four times after this to the Secretariat of Industry and Commerce, and the existence of this order was [955] always ratified. The data I obtained from the Department of Import and Export coincides with information collected by my partner, Dr. Robiola, in direct contact with the Secretariat of Industry and Commerce.

b. The date was around the middle of July, 1947, the place 25 de Mayo 197. There was no other person present, as the interview was a private one.

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

c. The order was given (according to my informant) the first few days of May 1946, by Mr. Rolando Lagomarsino, who was at that time Secretary of Industry and Commerce, I wish to state that he had been named to this position a short while before the order was made, and he made this deposition so that a proper study could be made of the glucose market. According to information, this order was in force during the period the investigation was made, which fact appears to be confirmed in that on 29th. August, 1946, resolution 6926 was dictated, which was later modified by 7499. The resolutions clearly indicate that a study was being made, conclusions of which were only definite when later resolution was passed.

d. I understand the order was not made public; it was made known only to the exporters who requested export permits, which were not granted.

e. This order was given in compliance with laws and decrees already mentioned, which gave the Secretariat of [956] Industry and Commerce full power to regulate commerce.

f. I understand there is no such record.

To the Second Cross-Interrogatory (to Defendant's Interrogatory No. 6) he says:

a. Yes.

b. Article 17 of the Civil Code which reads (quoted)

“Laws cannot be derogated in their entirety or in part except by other laws. Usage, custom

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)

or practice cannot create rights except when laws refer to them.”

c. I cannot cite the decision of any court on this matter, but I can affirm what I have already stated, that the Secretariat of Industry and Commerce is fully authorized by laws and decrees to regulate the exportation of products; no merchandise can be exported without permission of the Secretariat of Industry and Commerce, so whatever may be the legal aspects of the verbal order, it is a positive and concrete fact that unless permits are granted by the Secretariat of Industry and Commerce, products may not be exported.

d. I refer to my answer to the above question, and reiterate that, without permission of the Secretariat of Industry and Commerce, no exportation can be made, so that if the plaintiff in this case had no permit to export glucose, he could not comply with the contract. [957]

e. Article 5 of decree 659 of 14th. January, 1947, published in the Boletin Oficial 17th. January, 1947, and article 4 of decree 10893 of 24th. April 1947, published in the Boletin Oficial the 29th. 1947, state that the Boletin Oficial should publish the full text of laws promulgated by the Executive Power, and should also publish decrees, resolutions, reports and other data sent to them from the Press Office of the President of the Nation, with the purpose of making the state and movement of National ad-

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

ministration known to all, and also the purport of the laws and decrees.

This publication is made under the vigilance of the Director of the Boletin Oficial, but there are many resolutions, decrees and reports which are not published in the Boletin Oficial.

f. According to this, my opinion would vary or would not vary. If permit to export glucose was made after 1st. May, 1946, my opinion would vary because this would mean that even though order had been given to the contrary, permit was granted, but the fact that glucose was exported in the period under review does not change my opinion, because permits once granted and handed over to the exporter, are valid for 180 days, so that permit authorized in November of 1945, would call for glucose to be exported in May, 1946, and a permit granted in December, 1945, would permit exportation of Glucose in June, 1946, and so on. According to [958] information I have, Engraw did not have an export permit prior to 1st. May, 1946, so no export could be made.

g. I refer to the answer given to No. 7. The fact that exportation was made during this period does not prove interpretation of any order, exportation could have been made covering permits granted prior to May, 1946, and valid for 180 days.

h. In my opinion, the order of May, 1946, was the one which prohibited the export of glucose. The order, as I have already stated, is perfectly valid

Defendant's Exhibit T-2—(Continued)
(Deposition of Eduardo Martinez Carranza.)
and it would be useless to repeat myself. This order constituted a case of fortuitious circumstances which would make compliance with the contract impossible.

I wish to state that while at the University of Cordoba, among other works, I published a treatise on what is the precise theory of a fortuitious circumstance or force majeure, in which I cite numerous cases of our courts concerning this matter. I attach a copy of this Exhibit 7 work, as an integral part of my declaration. Among the authors cited in my work, who have written regarding the impossibility of fulfilling a contract when confronted with a fortuitious circumstance or force majeure, are the following: Planiol "Elemental Treatment of Civil Law, Volume 2, No. 231, page 90; Bruzin "Essay on the subject of foreseeing", page 24 and those following, Polaco "Obligations in Italian Civil Law", volume 1, page 333, No. 63, [959] Bonnecase "Supplement to theoretical and practical treatment of Civil Law", De Baudry, La Caninerie, No. 272, page 539, Salvat "Obligations in General" page 70, No. 146, Argentine Jurisprudence, volume 13, page 220.

To the Third Cross-Interrogatory (to Defendant's Interrogatory No. 9) he says:

A. In answering No. 9 I have based my opinion on the fact that the verbal order of the Secretary of Industry and Commerce is a fortuitious circumstance or force majeure. In this case and on account

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

of Articles 513 and 514 of the Argentine Civil Code, the contract is dissolved without responsibility of either party. I also refer to the jurisprudence cited in answering 10a.

b. I refer to the previous question.

To The General Corss-Interrogatory (to Defendant's Interrogatory No. 10) he says:

a. Yes.

b. It is published in Buenos Aires every working day.

c. The Boletin Oficial was created by law 438 on 5th. October, 1870. This law was derogated by law 697 of 15th. October, 1874, and definite creation of the Boletin Oficial was made by decree on 2nd. May, 1893. By decree 659 of 14th. January, 1947, already referred to, it was stated that official text of all laws passed by the Executive Power should be published in the Boletin Oficial, as also the [960] text of all other decrees, resolutions, reports and other data sent in by the various official institutions, which concerned the state and movement of National administration and what is ordered by laws and special decrees. By decree 10893 of 24th. April, 1947, also referred to, it is stated that the Director of the Boletin Oficial shall follow the publication in the Boletin Oficial of laws, decrees and acts of the Executive Power which have public character and which are sent in by the Press Office of the President of the Nation,

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

as also all other resolutions, reports and other official documents sent in by this office.

d. I refer to what I have already stated. In the decrees mentioned, reference is made to date of publication in the Boletin Oficial when this was the case.

e. Publication in the Boletin Oficial gives official character to the text of the laws, decrees or resolutions, and it is supposed that they are known by all, nevertheless, as stated already, not all resolutions are published in the Boletin Oficial, for example many resolutions of the Secretariat of Industry and Commerce have not been published in the Boletin Oficial, and the only publicity given them has been the affixing of information on boards in the buildings of the Secretariat, so that those interested would be advised. Article 2 of the Civil Code states that laws should be published but it does not say that they [961] must be published in the Boletin Oficial, there is no law to this effect, publication may be made in any other organ and be completely legal. I cite a case resolved by the Federal Chamber on 21st December, 1925, and attached a copy of same. Exhibit 8. It decided that a law was sufficiently publicised which appeared in an unofficial paper prior to its date of publication in the Boletin Oficial.

f. In my declaration whenever available I have mentioned the dates of publication in the Boletin Oficial of laws and decrees, and in the cases where

Defendant's Exhibit T-2—(Continued)

(Deposition of Eduardo Martinez Carranza.)

such dates are not mentioned it is because I could not locate copies of the Boletin Oficial.

/s/ EDUARDO MARTINEZ

CARRANZA

EDUARDO MARTINEZ

CARRANZA, Witness

/s/ ELSA ZABALA

ELSA ZABALA, Interpreter

/s/ FRED H. HAUSER JR.

FRED H. HAUSER JR.

Vice Consul of the United
States of America. [962]

DEFENDANT'S EXHIBIT T-3

In the District Court of the United States for the
Southern District of California
Central Division

No. 6223-BH

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A., a corporation
Plaintiff

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation
Defendant

INTERROGATORIES
and
CROSS INTERROGATORIES.

Deposition of Adolfo Carlos Magdalena, taken before me, Fred H. Hauser, Jr. Vice Consul of the United States of America at Buenos Aires, Argentina, at 9:30 a.m. on May 13, 1948, under authority and by virtue of a commission issued out of the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause.

It appearing that the witness, Adolfo Carlos Magdalena, could not intelligently testify in the English language, and did well understand the Spanish language, one Elsa Zabala, who also well understands said Spanish language, was employed as interpreter and was sworn as follows:

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

“You do solemnly swear that you will truly and [963] faithfully interpret the oath and questions to be administered to Adolfo Carlos Magdalena a witness now to be examined, out of the English language into the Spanish language and that you will truly and faithfully interpret the answers of the said Adolfo Carlos Magdalena thereto out of the Spanish into the English language.”

and said Elsa Zabala interpreted accordingly.

The answers of the witness, Adolfo Carlos Magdalena to said interrogatories and cross-interrogatories were taken down stenographically by Elsa Zabala, of Avenida Quintana 337, Buenos Aires, who was duly sworn as follows:

“You do solemnly swear that you will truly and impartially take down in notes and faithfully transcribe the testimony of Adolfo Carlos Magdalena, a witness now to be examined. So help you God.”

Adolfo Carlos Magdalena of Lavalle 710, Buenos Aires, Argentina, 37 years of age, lawyer, being by me first duly sworn as follows:

“You do solemnly swear that you will tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross-interrogatories now to be put to you. So help you God.”

deposes and says: [964]

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

ANSWERS BY ADOLFO CARLOS
MAGDALENA TO INTERROGATORIES

To the First Interrogatory, he says:

Adolfo Carlos Magdalena, 37 years of age, address Lavalle 710, Buenos Aires, Argentina, occupation lawyer.

To the Second Interrogatory, he says:

I have followed my occupation as a lawyer in the Federal Capital, and in La Plata. I am associated with Dr. Isidoro Pustilnick. We are lawyers for many important companies, among which are T. Froeschle & Co., H. Koch & Co., Cia. Arenera delPlata, J. A. Chilibroste & Co., La Blanqueda, Miguel Esteban Riglos, etc.

To the Third Interrogatory, he says:

I followed first three grades at school known as "Maria Sanchez de Thompson", and then attended Lacordaire, and graduated from there. I then went to the Law School of Buenos Aires and obtained my law degree. I was admitted to the practice of law in 1943. I have not held any official position.

We carry out all legal work in connection with the firms already mentioned, and for various other firms. We advise them as regards contracts, attend their meetings, advise them regarding the formation of other companies, compilation of balance sheets, etc. etc.

To the Fourth Interrogatory, he says: [965]

Various laws have been dictated in the Argentine

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

Republic referring to this matter: law 12591 promulgated 8th. September, 1939 and published in the Boletín Oficial on 11th. September, 1939, enforced from the date of its publication until 3rd. June, 1946. This law was modified by decree 16216 dictated by the Executive Power 3rd. June, 1946. Later on there was law 12830 promulgated 23rd. August, 1946, and published in the Boletín Oficial 16th. September of the same year. This was modified by law 12983, which will be in force until 3rd. June, 1952. Law 12983 was sanctioned 30th. April, 1947, and promulgated 3rd. May, 1947, and was published the same day in the Boletín Oficial. It is a law dealing with the cost of living, it applies penalties to those who infringe the law by charging prices which are considered too high, and gives the Executive Power full authority to apply these penalties. Law 12831 has no connection with the case under review, as it declared a National Holiday on 12th. August, to celebrate the Reconquest. Law 15591 does not exist and must have been quoted in error. None of the laws specifically forbid the exportation of glucose, but they authorise the Executive Power to limit, restrict, prohibit or authorise the exportation of products which might be considered necessary for the country. From this it is deduced [966] that the determining of which products are exportable is left to the authorities directly concerned, that is the Executive Power delegates authority to the pertinent departments

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

to handle his matter. Many resolutions and dispositions have been dictated covering this subject by these departments, stating which articles could be exported, which could not, and the formalities to be observed by the exporters in all cases. These dispositions have been numerous and many of course are not concerned with glucose. In connection with the exportation of glucose, the Executive Power dictated through the Secretariat of Industry and Commerce, the following resolutions which I think are the only ones directly concerned with this product: 5109, 6926 and 7499, copies of 6926 and 7499 are attached by Dr. Robiola to his deposition. 5109 states that in order to obtain export permits for glucose, the exporters must previously prove that they have turned in to the Government 1% of the maize harvest prior to and including 1945, and if after this date must show that the maize to be exported has been obtained from I.A.P.I. (Instituto Argentino Promocion Intercambio). There was also a verbal order given by Dr. Rolando Lagomarsino, Secretary of Industry and Commerce, during the first days of May 1946, prohibiting the export of glucose for a period of time [967] during which a study would be made of the market in general, and of glucose in particular. At the same time he requested retention by the Secretariat of Industry and Commerce of export permits already granted but not yet handed over to the exporters.

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

To the Fifth Interrogatory, he says:

I have cited all the laws and resolutions I know of regarding this matter, and do not think there are any others. The terms of the verbal order to which I have referred were to prohibit the exportation of glucose, that is, grant no new export permits, and to withhold those already granted but not handed to the exporters.

To the Sixth Interrogatory, he says:

The Executive Power, as already stated, is authorised to regulate the laws mentioned, being able to include or exclude products the export of which they deem necessary to limit, restrict or prohibit. Within our legal system these regulations must be covered by decrees and this has usually been done, but in order to establish the validity of the resolutions adopted by the Secretariat of Industry and Commerce it should be borne in mind that article 14 of law 12591, modified by decree 16216, was fully descriptive, that is, the Secretariat of Industry and Commerce was authorised to determine what articles should be exported, and the means by which control should be [968] maintained. The verbal order, to which I have referred, was made in May 1946, during which time the country was under a *de facto* Government, that is in the hands of a group of military men who had brought about the revolution, so that whatever might be the validity of this verbal order during normal times, I consider it was completely legal from every aspect during the

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

period it was given due to the abnormal conditions under which the country was existing. The Congress was dissolved by this de factor Government, which by Act of Congress, was the entity which sanctioned laws. In the absence of this legal body the Executive Power was vested with legal authority and dictated many decrees which were considered laws and carried out accordingly. According to the Constitution a law may only be modified by another law never by a decree, nevertheless in the period mentioned, 4th. June 1943 to 4th. June 1946, the Executive Power dictated decrees which modified laws, and even exonerated judges by the passing of a simple decree. According to our legal system judges may only be removed by death or by a trial before the Chamber of Deputies with a sentence passed by the Senate. New judges were appointed by the Executive Power, and these judges passed sentences which have not been disputed, even though the judges were not appointed in a strictly legal manner. I mention this to accentuate the abnormality of the times, [969] and from what I have said it may be deduced in a categorical manner that whatever may be the legal aspects of the resolutions passed by the Executive Power, theoretically they may be disputed, but practically they were in full effect.

To the Seventh Interrogatory, he says:

I have no knowledge of any such interpretations.

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

To the Eighth Interrogatory, he says:

I refer to No. 7.

To the Ninth Interrogatory, he says:

As regards this question, I consider that the contract could not have been complied with because, as already stated, there was a prohibition existing covering the export of glucose, and as the object of the contract consisted of the obtaining and delivery of a quantity of this merchandise, the verbal order preventing export of glucose would necessarily make compliance with the contract quite impossible. This constituted a case of force majeure and the contract would automatically be dissolved without responsibility to either party, according to Article 513 of the Civil Code, and also Article 514.

To the Tenth Interrogatory, he says:

I found my opinion on Articles 513 and 514 of the Argentine Civil Code, which determine what constitutes a case of force majeure, or fortuitious circumstance. [970] These articles have been fully quoted by Drs. Robiola and Carranza in their depositions. There have been many court cases on this matter, and these also have been fully referred to by Drs. Robiola and Carranza.

To the Eleventh Interrogatory, he says:

In the form in which laws are sanctioned it is stated in our Constitution that a law must be sanctioned by the Legislative Power, and the Executive

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

Power in its character of co-legislator can veto, modify or promulgate it. If vetoed, the law returns to the Chamber of origin, and in the case of the existence of both Chambers, if it passes by $\frac{2}{3}$ votes, it goes again to the Executive Power, who are then obliged to promulgate it. If they do not, within a certain period the law automatically goes into effect. Once a law has been published it is presumed known by all the inhabitants of the Republic, who must submit themselves to the dispositions of the law.

A decree is an act which emanates only from the Executive Power and must, within the dispositions of our Constitutional regime, be subject to the rules of the Constitutional regime, be subject to the rules of the Constitution. A decree cannot modify a law, see part 2. of Article 86 of the National Constitution.

Regulations, resolutions and orders emanate from the various Ministries, Secretariats, and Departments to which [971] the Executive Power has delegated many of its functions. No special publicity is required in order that they be considered valid, although it is usual that the departments concerned give them certain publicity, but at times this is done in a very restricted manner.

In the case of a conflict between a law and a decree, the law prevails over the decree.

My opinion is based on my experience in the exercise of my profession.

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

To the Thirteenth Interrogatory, he says:

My opinion would not be changed, as it is founded on my knowledge of Articles 513 and 514 of the Civil Code which cover fortuitous circumstances of force majeure. The contract was dissolved because of the fortuitous circumstance which existed through the giving of the verbal order by Mr. Lagomarsino. In the supposition that this verbal order was non-existent then the contract would have full value and the telegram of 7th. June, would have no value because the contract could not be dissolved by the unilateral desire of one of the parties.

To the Fourteenth Interrogatory, he says:

I do not know of any court decisions on this matter and refer to my answer to the previous question, and legal dispositions which I have cited. [972]

/s/ A. C. MAGDALENA,

Adolfo Carlos Magdalena,

Witness.

/s/ ELSA ZABALA,

Elsa Zabala,

Interpreter.

/s/ FRED H. HAUSER, JR.,

Fred H. Hauser, Jr.,

Vice Consul of the United
States of America.

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

ANSWERS MADE BY ADOLFO CARLOS
MAGADALENA TO CROSS-INTERROGA-
TORIES

To the First Cross-Interrogatory (to Defendant's Interrogatory No. 5), he says:

a. On my return from a trip to Europe last year, about the middle of October, I had an interview with Dr. Robiola who asked me very specially to go to the Secretariat of Industry and Commerce to ratify information he had been given, that there was in effect a verbal order prohibiting the export of glucose. I went there at the end of October (25 de Mayo 197) and called on a colleague, who is also a personal friend of mine, and he advised me that Mr. Rolando Lagomarsino in May, 1946, had given this verbal order, prohibiting all permits for glucose and requesting that all permits granted but not handed over be retained by the Secretariat of Industry and Commerce. I do not give the name of this gentleman as he requested my discretion in this respect. There were no other persons present.

b. Date and place have already been given.

C. The order was given at the beginning of May, and was to be in force while the internal situation of maize was being studied. Small exports were made during this period but this was because permits once granted and turned over to the exporters, were good for 180 days, so that permits delivered prior to May 1946 were good until the end [974] of September 1946.

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

d. This verbal order was given the necessary publicity within the departments concerned, and all employes connected complied with same. It was not published in any newspapers.

e. Law 12591 modified by decree 16216 delegated to the Secretariat of Industry and Commerce full power to control export and import matters. Mr. Lagomarsino when he gave the verbal order prohibiting export of glucose, had complete authority to do so, and the fact of its complete efficacy is evident, in that everyone concerned complied with same.

f. I do not think there is any record, as the order was verbal and was not published in any newspaper.

To the Second Cross-Interrogatory (to Defendant's Interrogatory No. 6), he says:

a. Yes.

b. Article 17 of the Argentine Civil Code reads: "Laws cannot be derogated in their entirety or in part except by other laws. Usage, custom or practice cannot create rights except when laws refer to them."

c. I refer to what I have already stated, in accordance with authority conferred by decree 16216, the Secretary of Industry and Commerce had complete power to limit, prohibit or authorise exportation of products or merchandise. Whatever might be considered legal aspects of decisions taken by the Secretariat of Industry and Commerce, reality is that if export permits are not granted by them,

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

then merchandise does not leave the country, and this condition is still prevalent, and was even more strictly enforced during the period under consideration, May 1946. Any disposition passed by the Secretariat of Industry and Commerce, however arbitrary it might be, had full effect in the Republic, because due to the abnormal conditions under which the country was living after power had been usurped in the revolution of 4th. June, 1943, the de facto Government had taken over all the executive and legislative power, and delegated authority to the various Ministries, Secretaries, etc., to carry out whatever measures they considered necessary, so that any resolutions of any kind passed by the Secretariat of Industry are considered completely valid and legal from every point of view.

d. I refer to what I have already declared.

e. Orders, regulations, etc., in order to be valid do not have to be published, at times this information is posted on the walls of the various departments concerned for the advice of those interested. I do not know of any legal disposition which requires their publication in any special manner.

f. Yes, this would affect my opinion fundamentally, because if new permits had been granted it would prove the inefficacy of the verbal order to which I have referred, [976] however, according to my information no new permits were authorized by the Secretariat of Industry and Commerce during the period under consideration. As I have already

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

stated, small quantities of glucose were exported during this time but they were covered by permits granted and handed over prior to 1st. May, 1946 which were good for 180 days.

g. I have already referred to this in my answers.

h. The exportation of glucose was prohibited by a verbal order emanating from Mr. Rolando Lagomarsino, who, as Secretary of Industry and Commerce, was fully authorized to make this order, as per law 12591 modified by decree 16216, which delegated power originating from the Executive Power. This verbal order could or could not be considered completely legal, but it was put into practice and carried full force as no new export permits for glucose were granted after 1st May, 1946.

Basis for my opinion has already been stated.

To the Third Cross-Interrogatory (to Defendant's Interrogatory No. 9), he says:

a. I have already stated that a verbal order existed which prohibited the export of glucose and, therefore, a case of fortuitious circumstance existed, as covered by Articles 513 and 514 of the Civil Code, so that automatically the contract would be dissolved without [977] responsibility of either party. I also refer to jurisprudence referred to in answering 10a.

In order that a case of fortuitious circumstance or force majeure may be considered to exist, it must be proved that there is an unseen obstacle which would make it impossible for the contract to

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

be complied with. Foreign and national authors of works on this subject have stated that impossibility of complying with a contract when confronted with unsurmountable obstacles constitutes a fortuitious circumstance or force majeure.

b. Various authors who have written on this subject have been cited by Drs. Robiola and Caranza.

To the General Cross-Interrogatory (to Defendant's Interrogatory No. 10), he says:

a. Yes.

b. In Buenos Aires every working day.

c. The Boletin Oficial was created by law 438 in 1870, which law was derogated in 1874, and definite creation was effected by decree of the Executive Power 2nd. May 1893, when it was stated that Boletin Oficial would publish laws, decrees, resolutions, reports, and other data, which showed the state and movement of the Administration. In January 1947 a decree was distated, which was published in the Boletin Oficial on 17th. January, 1947, wherein it was stated that the official text of laws promulgated by the [978] Executive Power, decrees, resolutions, reports and other data received from official institutions, should be published in the Boletin Oficial, in order to make known the state and movement of national administration. By a later decree of 24th. April, 1947, 10893, it was established that the director of the Boletin Oficial would be responsible for the publication in this organ of

Defendant's Exhibit T-3—(Continued)

(Deposition of Adolfo Carlos Magdalena.)

laws, decrees and acts of the Executive Power which have public character or are sent in by the Press Office of the President of the Nation.

d. I refer to my previous reply.

e. It is presumed after laws, resolutions, and decrees are published in the Boletín Oficial that they are known by all. According to professional opinions I have obtained it is not essential for their validity that resolutions be published in the Boletín Oficial, and this is the case of many such measures passed by the various Ministries, Secretariats and Departments who, as already stated, affix the information to the walls of respective institutions. There is no law calling for publication in the Boletín Oficial, only decrees to this effect, publication in any other organ is sufficient, this was stated by the Federal Court of the Capital in a sentence passed by them. It was stated that publicity given over the radio was sufficient to make a resolution known to the public. This decision was published in "Justicia del Trabajo." [979]

f. This information has been given where available.

Dr. Magdalena consulted his notes when replying to questionnaire.

/s/ A. C. MAGDALENA,
Adolfo Carlos Magdalena,
Witness.

/s/ ELSA ZABALA,
Elsa Zabala,
Interpreter.

Defendant's Exhibit T-3—(Continued)
(Deposition of Adolfo Carlos Magdalena.)

/s/ FRED H. HAUSER, JR.,

Fred H. Hauser, Jr.,

Vice Consul of the United
States of America.

Republic of Argentina,

City of Buenos Aires,

Embassy of the United States of America—ss.

I, Fred H. Hauser, Jr., Vice Consul of the United States of America, in and for the consular district of Buenos Aires, Argentina, the commissioner named in the annexed commission, do hereby certify that in pursuance of said commission, I examined Dr. Mario Robiola, Dr. Eduardo Martinez Caranza, and Dr. Adolfo Magdalena at my office in Buenos Aires, Argentina, on the 10th, 11th, and 13th days of May, 1948, and that the said witnesses being to me personally known and known to me to be the same persons named and described in the interrogatories and commission annexed, being by me personally sworn to testify the truth, the whole truth, and nothing but the truth in answer to the interrogatories and cross-interrogatories in the cause in which the annexed commission is issued, their evidence was taken down by me, and after being taken down by me, and after being read over and corrected by them respectively, was subscribed by them respectively in my presence; and I further certify that I am not counsel or kin to any of the parties to this cause or in any manner interested

Defendant's Exhibit T-3—(Continued)

in the result thereof.

In witness whereof, I have hereunto set my hand and [981] seal of office at Buenos Aires, Argentina, this twenty-fourth of May, 1948.

/s/ FRED H. HAUSER, JR.,

Fred H. Hauser,

Vice Consul of the United States of America, Acting as Commissioner. [982]

Service No. 4632a.

Fee No. 32, \$10.00 Equal to \$41.00 Arg. Paper.

Service No. 7633a.

Fee No. 32, \$69.00 Equal to \$282.90 Arg. Paper.

(Stamps and Stamp Dates.)

[Seal] [983]

DEFENDANT'S EXHIBIT U

Purchase Order

Schenley Distillers Corporation

800 Tennessee Street

San Francisco 7, Calif.

To (Vendor)

Ship Prepaid to

Date Pur. Req. No.

Page No. of A.A. No.

F.O.B.

Routing

Terms

Shipping Date Specified

Quantity Unit Stock No. Description Unit Price

Defendant's Exhibit U—(Continued)

Important—The terms and conditions embodied on the front and reverse sides of this order shall constitute the sole and entire contract of purchase of the articles described herein and shall not be binding upon the buyer unless signed by our director of purchases or such authorized person as has been designated in writing by our director of purchases to the vendor.

Sign and Return Copy No. 2 Attached hereto

To Schenley Distillers Corporation

800 Tennessee Street

San Francisco 7, Calif.

as your acknowledgment and acceptance of this order.

Your Regular Form of Letter of Acknowledgment, while appreciated, does not constitute an acceptance of this order.

SCHENLEY DISTILLERS
CORPORATION.

(Buyer.)

.....

Signature.

.....

Title.

Instruction for
Shipping and Billing

1. All shipments must be accompanied by packing slips or loading tickets marked "Partial or Complete."

2. Duplicate copy of Bill of Lading must be mailed to Consignee.

Defendant's Exhibit U—(Continued)

3. Invoices marked "Partial or Complete" must be rendered in Triplicate together with original copy of bill of lading to Disbursement Audit, 850 Battery Street, San Francisco 11, Calif., within 24 hours.

4. At the end of each month, Fully Itemized statements of account, showing all debits and credits, must be rendered to Disbursement Audit, 850 Battery Street, San Francisco 11, Calif.

5. Our Purchase Order Number and Department must appear on all invoices, packages and shipping papers.

(Reverse Side of Exhibit U)

Terms and Conditions

1. This order shall not be binding upon the company, unless signed by our Director of Purchases, or such authorized persons as have been designated in writing to you by our Director of Purchases, and for the vendor in the respective spaces provided. The terms and conditions embodied on the front and reverse sides of this order shall constitute the sole and entire contract of purchase of the articles described herein. By accepting this order the vendor warrants and agrees that this is the only agreement with respect to the purchase and sale of the merchandise specified herein and that there is no outstanding oral agreement between the parties relating to the sale of merchandise. No agreement or understanding modifying, waiving or making any exception in respect of any

Defendant's Exhibit U—(Continued)

of the terms and conditions of this order, or increasing the price or quantity stated on the face of this order, shall be binding on us unless made in writing, and signed in the same manner as this original order.

2. If price is omitted from this order, it is agreed that your price will be the lowest prevailing market price.

3. No overruns of any kind or nature will be allowed unless specified on the face of this order. No overtime charges will be honored unless prior written authorization, signed in the same manner as this order, is given.

4. All terms and conditions hereof must be complied with fully. Merchandise tendered for delivery must conform in every respect with the specifications, blueprints, approved samples or other requirements of this order, and must be of good workmanship and quality. Delivery must be made at such time and in such quantity as specified herein. In the event of any breach of the foregoing provision, and, in addition to all other remedies granted us by law, we shall have the right to refuse to accept delivery and to require you upon written demand to reimburse us for all our loss, damage or expense resulting therefrom, and we may consider this order cancelled, without being required to give you written notice of cancellation.

5. All merchandise is subject to our inspection and acceptance. In addition to all other rights granted us by law, we may return defective goods,

Defendant's Exhibit U—(Continued)

at your expense, for full credit or, at our option, for replacement at the price stipulated herein. Acceptance of defective goods shall not preclude us from rejecting other goods delivered under this order because of the same or different defects.

6. By acceptance of this order, you agree that any affiliated corporation or corporations of Schenley Distillers Corporation, to which the goods covered by this order (or any part thereof) are delivered or transferred shall have the benefit of all rights and privileges under this order, including, without limiting the generality of the foregoing, the benefit of all warranties either express or implied.

7. By acceptance of this purchase order, the vendor expressly warrants that all materials to be furnished hereunder, will be delivered in conformity to and in compliance with all applicable orders and regulations of the War Production Board, and will be invoiced at prices which conform to and comply with regulation, or any amendment thereof, of the Office of Price Administration, as expressed and set forth in any price schedule, Maximum Price Regulation, or the General Maximum Price Regulation, whichever shall be applicable.

8. All merchandise shall be at your risk until safely delivered and received by us on our premises or the premises of the consignee at the point of destination. All transportation charges to the destination shown on this purchase order must be prepaid by you. Where purchases are made f.o.b.

Defendant's Exhibit U—(Continued)

your plant, you shall add such prepaid transportation charges to the amount of the invoice. Paid transportation bills must be attached to your invoice.

9. You agree that patterns, tools, and dies or any equipment purchased for the manufacture of any merchandise for us, will be purchased by you at your expense.

10. It is understood that any articles made according to our design or first made for us will not be furnished by you to any other person, firm or corporation except with our written consent.

11. All packing and cartage charges shall be assumed and paid by you and will not be allowed by us. If your deliveries are so far behind the schedules specified in this order as to make it necessary for us to request you to make shipments by express, it is understood that you will allow the difference between the freight and express charges.

12. Weights, measures and counts taken by our representatives are to be controlling in all adjustments between us.

13. You agree to indemnify and hold us harmless against any loss or damage by fire or otherwise (whether caused by any negligence or otherwise) to any of the merchandise covered by this order, while the same is in your possession, or the possession of your agents or sub-contractors, or any other concern with which you have stored or

Defendant's Exhibit U—(Continued)

by which you have permitted such merchandise to be kept.

14. You agree to hold Schenley harmless from, and to indemnify Schenley against, all loss, liability, damage and expense (including, in the case of litigation, reasonable attorneys' fees and disbursements) arising from or suffered or incurred in connection with (a) any claim of injury to person or property caused in whole or in part by any act done by you, your agents or employees while executing this order or making delivery hereunder, or (b) any claim, with respect to any of the merchandise called for by this order, or arising out of the use of such merchandise, of infringement of any patent, copyright, trademark, trade name, brand or slogan, unfair competition, or other adverse statutory or non-statutory rights, or (c) any litigations based on any claim referred to above. We agree to give you reasonable notice of the commencement or threatened commencement of any such litigation. As used herein, "Schenley" includes Schenley Distillers Corporation and its subsidiary and affiliated companies. This paragraph No. 14 shall have no application to any claim based upon the use of any trademark, trade name, brand or slogan by Schenley, upon any of its products.

15. In the performance of your obligations hereunder, you, your agents, servants and employees shall observe all provisions of Federal, State and local labor and safety laws and regulations, as well as our working and safety rules, a copy of which

Defendant's Exhibit U—(Continued)
will be furnished to you.

16. If this order involves the use of either letterpress work, lithograph (or offset work), intaglio gravure work or photography, it is agreed: (a) All art work, original plates, negatives and positives utilized in letterpress work; all art work, all photographic prints, negatives and positives utilized in intaglio gravure work; and all photographic negatives and positives and plates utilized in photography—any or all of which may be used in the production of this order, are our sole and exclusive property and shall be delivered to us upon demand therefor. (b) Without cost or expense to us, you will store and preserve in condition suitable for reuse, for a period of fifteen (15) months from the date of this order, all of the materials enumerated in subdivision (a) hereof, and in addition the stones and/or plates utilized in lithography or offset work. You agree to furnish transfer impressions to us from said stones or plates when requested by us, at the cost of not over \$10 for each color. If, at the end of said fifteen (15) months, any of the materials enumerated in subdivision (a) hereof or in this subdivision is not available for reuse, for any reason whatever, you agree to replace the same at your own cost and expense. Such of said materials delivery of which is not requested by us within said fifteen (15) month period shall become your exclusive property. We shall have the right to furnish the materials enumerated in subdivision (a) hereof at our option and all provisions hereof

Defendant's Exhibit U—(Continued)

shall apply to such materials.

17. If this order provides for the manufacture, pursuant to our specifications, of any printed, lithographed, engraved or similar materials the purchase order number and code number followed by your initials must appear on the job and three samples must be sent to the Director of Purchases as soon as job is completed, unless otherwise specified herein and samples and/or press proofs must be submitted to us for approval before commencement of work, unless such submission is expressly waived in writing by our Director of Purchases or such authorized persons as have been designated in writing to you by our Director of Purchases.

18. You agree to store the merchandise called for by this order, at your own risk, free of any liability or expense to us for the period during which shipments are to be made. If no period for such shipment is stated on the face of this order, then you agree to store the merchandise for a period of four (4) months from the date hereof. We shall not be under any liability to anyone for the cost of storage of any merchandise remaining undelivered at the expiration of said period unless you send us by registered mail a written notice addressed to our Director of Purchases stating that charges for said storage will be made unless delivery instructions are given, and itemizing the quantity of undelivered merchandise, the place at which it is and is to be stored, and the amount to be charged for storage. Unless we give you delivery instruc-

Defendant's Exhibit U—(Continued)

tions within ten days after receipt of such notice, the maximum amount of our liability for the cost of storage of the merchandise remaining undelivered shall be the amount, if any, actually paid by you for said storage, but not to exceed the lowest prevailing rate for such storage. We shall pay said storage charges monthly upon receipt of a written invoice therefor and, if you do not store the merchandise yourself, evidence satisfactory to us of the actual payment made by you for such storage. Our liability to pay for storage shall cease when we give instructions for the delivery of the merchandise.

19. If all prior deliveries were made at such times and in such quantities as are specified herein, and nonetheless a balance remains undelivered at our request or in the absence of specific delivery instructions herein, we agree to pay for the undelivered balance within five (5) days after you give us (a) evidence satisfactory to us that all the materials and labor entering into the manufacture and final assembly of said merchandise have been paid by you and the merchandise is in your possession, set apart from your regular inventory, or otherwise stored and marked "Property of Schenley Distillers Corporation," or with such other names as we direct in writing and (b) certificates showing that said merchandise is adequately covered by insurance against fire and theft, which certificates shall contain the provision that no material change in or cancellation of the insurance

Defendant's Exhibit U—(Continued)

contracts shall be effective unless ten (10) days prior written notice is received by us at 800 Tennessee Street, San Francisco 7, Calif.

REPORTERS' TRANSCRIPT
OF PROCEEDINGS

Los Angeles, California
Wednesday, June 9, 1948

(Case called by the clerk.)

The Court: All right, gentlemen, proceed.

Mr. L. B. Stanton: I will call Mr. Juan Lang.

JUAN K. LANG

called as a witness by plaintiff in rebuttal, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Juan K. Lang.

Direct Examination

By Mr. Louis B. Stanton:

Q. Your name is Juan Lang? A. Yes.

Q. Where do you reside, Mr. Lang?

A. Buenos Aires.

Q. Buenos Aires, Argentina?

A. Argentina.

Q. How long have you lived there?

A. For about 10 years.

Q. And have you a business there?

A. Yes.

Q. What business is that?

A. I am a partner of Eugenio Lang SRL.

Q. That means? [996]

(Testimony of Juan K. Lang.)

A. A company of limited responsibility.

The Reporter: I did not get that.

The Witness: A company of limited responsibility.

Mr. L. B. Stanton: A company of limited responsibility. You, among other things, have been engaged in exporting glucose from the Argentine Republic? A. Yes.

Mr. L. B. Stanton: I have shown these documents to counsel, your Honor. They are in Spanish and I have made a translation for the court.

Q. I show you this document, Mr. Lang, to which is attached a yellow paper. Do you recognize that document? A. Yes.

Q. What is that document?

A. That document is a copy of an export license, an Argentine export license applied for by our firm for the export of glucose.

Mr. Bronson: Mr. Stanton, can I ask you to have Mr. Lang speak up a little louder?

The Witness: Sure. Excuse me.

Mr. Bronson: It is hard to hear down here, please.

Q. (By Mr. L. B. Stanton): I note it says at the head "Copia 3," which means there are three copies made and this is the third copy?

A. I suppose it is. I don't know. [997]

Q. Right at the top? A. Yes.

Q. Then it is dated "Buenos Aires, the 28th of May, 1946"? A. Yes.

Mr. Bronson: I am going to object to this method

(Testimony of Juan K. Lang.)

of examination. Let him offer it and then question the witness.

Mr. L. B. Stanton: That was a preliminary question.

Mr. Bronson: I might have objection to it, your Honor.

The Court: Yes. Go ahead.

Q. (By Mr. L. B. Stanton): Do you note the date upon the license, "28th of May, 1946"? By whom was that affixed, that note?

Mr. Bronson: We will object to this. Let the document be offered and then the objection can be made.

The Court: I think he may be trying to establish the character before he offers it, and there is no objection to the question. Go ahead.

A. This date is affixed, the stamp is affixed by the director. I mean it is called "Direccion de Exportacion de Importacion." How should I say—the office of export.

Q. And you will notice in the other corner under the word "control" there are some initials apparently? A. Yes. [998]

Q. By whom was that placed?

A. By some officials of the Direccion de Exportacion de Importacion. I don't know by whom.

Q. There is another writing under that date.

A. Yes. That is a signature. I don't know by whom.

Q. Where did you receive it? Did you ever obtain this permit of exportation, this document I

(Testimony of Juan K. Lang.)

am showing you? A. Yes.

Mr. Bronson: I do not hear the question. I am sorry.

Q. (By Mr. L. B. Stanton): Where did you obtain this document which I am showing you?

A. This document was given to us against payment of the corresponding fee.

Q. By whom?

A. By the Direccion de Exportacion.

Q. There is attached to this document a yellow sheet. Did you obtain that yellow sheet?

A. Yes.

Q. And from whom was it received?

A. This was received by the Banco Central de la Republica Argentina. It is a central bank of the Argentine Republic, where the fee has to be paid.

Q. It was delivered to you by that bank?

A. Yes.

Q. And it indicates some amount that had been paid. [999] Is that the amount that you paid?

A. One-half of one per cent of the full value of the merchandise.

Mr. L. B. Stanton: We offer these documents into evidence, your Honor—this document into evidence.

The Court: All right.

Mr. Bronson: We will object to it at this time, if your Honor please, on the grounds that this is not rebuttal and it has all been gone into on the deposition of this witness taken in Argentina; on the further grounds that he denied the possession of

(Testimony of Juan K. Lang.)

this document in the answers to cross-interrogatories that were propounded by defendant in that deposition. That deposition is in the record now.

The Court: Well, I had hoped to read the depositions before now but I have not had the opportunity to do so. I intend to do that in the next two or three days, because my calendar is now clear.

Mr. L. B. Stanton: I believe that counsel is in error in his statements there. The matter of the issuance of the permit was not gone into upon the interrogatories at any time, and there were no interrogatories addressed to the date of the issuance of a permit. This is directly rebuttal because it was brought out on the depositions of counsel's witnesses from the Argentine that no permits were issued subsequent to May 1, 1946; and they stated that their [1000] views as to the laws would be contrary, if it was so established that any permits were issued subsequent to May 1, 1946.

The Court: This is dated June 11, 1946?

Mr. L. B. Stanton: Yes.

The Court: Well, I will tell you gentlemen what I will do. I am going to overrule the objection and I will reserve you a motion to strike before the case is concluded, because it is understood that we have to keep the case open for the answers to Letters Rogatory and the matter will be argued. So, before we close, you may make a motion to strike this. By that time I will have read the depositions and, in the light of all of the testimony I will be in a better position to determine whether it bears upon the issues.

(Testimony of Juan K. Lang.)

I do believe that where it is insisted that export licenses could not, as a general rule, be obtained, that it is permissible to show that such licenses actually were issued as of that date. So, regardless of any understanding, either oral or interpretive understanding of written regulations, if as a fact permits were or were not granted, that is material.

This is exactly the reverse of the situation which arose in the examination of another witness where, in answer to an argument of Mr. Stanton's, I suggested that regardless of legality or illegality, that if as a fact such licenses [1001] could not be obtained, that the fact was material. So this is the other side, another facet of the same problem.

Assuming that there is testimony in the record to the effect that there was an oral order issued not to grant such licenses, the point is material to show that regardless of any such oral understanding such permits actually were issued. It goes to the weight of the testimony and it would bear upon the credibility of the witnesses who gave their understanding of the oral orders, as it were. It would lend itself to the argument that they should be examined about the date when the order went into effect. It may have gone into effect later on.

Mr. Bronson: I apprehend your Honor's ruling.

The Court: The objection is overruled.

Mr. Bronson: Does your Honor make a suggestion that I make a motion to strike now or later?

The Court: No; later. I am reserving it to you

(Testimony of Juan K. Lang.)

because at the present time I have not any more light.

Mr. Bronson: I understand that. It is just a question of the timing of it, that is all. Sometimes you forget them.

The Court: I think you misunderstood me. I said I will admit it and reserve a motion to strike, to be made before the case is concluded.

Mr. Bronson: All right.

The Court: Because it is understood we will have to [1002] keep the case open until those additional matters are received from the Argentine. The objection is overruled; it may be received and marked Plaintiff's Exhibit. Is there one of these translations here?

Mr. L. B. Stanton: One is a translation, your Honor.

The Court: Have you more than one?

Mr. L. B. Stanton: I have two others. The other two are exactly the same as that exhibit except with regard to certain matters stated on the third page.

The Court: Do you want them all as separate exhibits?

Mr. L. B. Stanton: Well, they might be numbered the next exhibit in order, A, B, C if your Honor chooses.

The Court: The objection will be overruled. They may be received.

Mr. Bronson: Subject to the same understanding with respect to the remaining two, they need not

(Testimony of Juan K. Lang.)

be identified. That formality may be done away with.

Mr. L. B. Stanton: You stipulate that the testimony of Mr. Lang in respect to the one already introduced will be the same with regard to these other two?

Mr. Bronson: Yes; that will be all right.

The Court: With that, they may be received and marked, subject to the same motion to strike, and, as a part of the same exhibit we will attach the translation. I have compared them. It is an accurate translation, I think. [1003]

Mr. Bronson: What are the exhibit numbers?

The Clerk: Shall I number these as separate exhibit numbers, your Honor, A, B, and C?

The Court: Mark them A, B, and C because they relate to the same matter, and then put the translation with them.

The Clerk: The translations are attached to Plaintiff's Exhibit 71 in evidence. Plaintiff's Exhibit 71-A in evidence; Plaintiff's 71-B in evidence.

(Plaintiff's Exhibits 71-A and 71-B appear to be duplicate forms differing in amounts—not copied.)

(Translation of Plaintiff's Exhibit 71, 71-A and 71-B:)

(Testimony of Juan K. Lang.)

PLAINTIFF'S EXHIBIT 71, 71-A AND 71-B

Copy 3 Is for Interested Party

Permit No.....

National seal

Argentine Republic

Secretary of Industry and Commerce

General Director of Commerce

Director of Exportation and Importation

Application No. 189.051-46

Permit for Exportation

Original is sealed for \$.

Name or firm style—Eugenio Lang S/R/L

Domicile: Street-Ave. R.S. Pena 615.

City-Capital Prov. or Territ.

No. of description—JJ-56.

Telephone: 34-2422.

The Direction of Exportation and Importation certifies that by resolution S.I.C..... given on this date at above indicated firm has been authorized to export through [1004] the port of the capital and with destination the United States of America the merchandise which is subsequently given in detail:

Quality in Kgs. Net 50.000.

Detail, Characteristics and Container National Money Fifty thousand kilograms of glucose of maize, liquid, 43/45 Baume; in new wooden casks.

Value F.O.B. 56.907.

(Testimony of Juan K. Lang.)

Copy Not Valid

94345

50.000

56.907

Total Net Weight—Fifty thousand kilograms.

Total Value F.O.B.—Fifty-six Thousand Nine Hundred Seven pesos lawful national money.

This authorization expires the 24th day of November, 1946.

Control.

ND. FHP.

Buenos Aires—28 May, 1946

Indistinguishable Signature

Page two:

Quadruplicate—For the Depositor.

Central Bank of the Argentine Republic

Official Current Accounts

Credit Note for the account of:

The Secretary of Industry and Commerce [1005]

Collectors Office No. Cta. 2531

(Decree No. 141.132-43) E.L.

Application No. 189.052/46

Payment corresponding to: Permit No.....

Name or firm style—Eugenio Lang S.R.L.

Domicile—Ave. R. S. Pena 615 Buenos Aires

Exporters Register No. JJ 56

Effective —

Check No. 483468, City Bank..... 284.54

Check No.

Total National Money..... 284.54

(Testimony of Juan K. Lang.)

Received National Money—Two Hundred Eighty-four and 54/100 Pesos Which corresponds to 5% of the value F.O.B. of the merchandise authorized to be exported by said license.

Buenos Aires 11th of June, 1946.

Signature of Depositor, Eugenio Lang Soc. de Resp. Ltd.

Write clearly.

The above receipt is stamped as follows:

Approval No. 2058

Page No. 293

Entered N.P.

Seal Central Bank

June 11, 1946

There are two other export permits which are the same as the above except as follows:

License No. 189052-46 is for 150,000 kilograms of the value of 152.200 pesos.

Destination—Switzerland. [1006]

The receipt attached thereto is for 761 pesos.

The third is for 25000 kilograms glucose, packed in 650 wooden chests.

Value 17.150.

Receipt attached thereto is for 85.75 pesos.

Otherwise the other two are stamped with the same No. 04345, dated same date, 28 of May, 1948.

The receipts are the same, 11th of June, 1946.

(Testimony of Juan K. Lang.)

Q. (By Mr. L. B. Stanton): Now, Mr. Lang, these three documents which you have just been shown, Exhibits 71, 71-A and 71-B, all bear the stamped date of May 28, 1946. From that or from your other knowledge could you tell me when your application for these permits was filed?

A. All permits are, as a rule, stamped when they are filed. Of course, there is always one day or two days difference, as long as it takes from the cabinet where they are presented to come to the so-called register of entry papers, could be sometimes the same day, could be the day before.

Q. Would it be any more than, say, a week?

A. No; that would not be possible.

Q. What is the next operation after filing your application?

A. We should not have to do anything until we are [1007] informed that application is granted, and we have to pay the corresponding fee. As a matter of fact we generally send our employees to see that it goes from one—how should I say—from one department to the other in proper time; and then the next step is that we have to pay the corresponding fee and against the delivery of the receipt of the Central Bank that the fee has been paid the export license, the original of the export license, is given to us.

Q. And you paid this on June 11th, according to this exhibit; you paid the Central Bank the fee, which, in this instance, was 85.75 pesos?

A. Pesos.

(Testimony of Juan K. Lang.)

Q. Then what did you do with that receipt?

A. With that receipt we have to go to the Direccion de Exportacion to resolve the export license.

Mr. Bronson: You what?

The Witness: Receive the export license. Excuse me if I express myself sometimes wrong.

Q. (By Mr. L. B. Stanton): What do you do with the export license?

A. The export license we keep with us until we export the merchandise, and that license, then it has to be given to the custom house.

Q. I am showing you now, Mr. Lang, Plaintiff's Exhibit 64, being the Resumen Mensual de Exportacion. Do [1008] you recognize that?

A. Sure.

Q. I note in there on the head line—do you note the head line on this instrument?

A. Yes. It says "Glucosa."

Q. And below that do you find your firm name?

A. Yes. Those are the exporters of our firm, of Eugenio Lang S.R.L.

Q. You connect up those exports stated forth in there with the exhibit which has just been introduced, the export license?

A. These are exports made by our firm, and these are export licenses obtained by our firm. Exports can only be made with export licenses, and this would connect.

Q. Would you say that this exportation set forth in there was the one set forth in your export license.

(Testimony of Juan K. Lang.)

A. It could be. I cannot be completely sure. We have licenses and simply export against them.

Q. I will show you Exhibit No. 65—no; you were not on 65. Pardon me. I will show you Exhibit No. 66. Do you note your name there?

A. Yes.

Q. And that was for the exportations during the month of August? A. August. [1009]

Q. Do you know when you would have procured the export license for covering that exportation?

A. No. May I try to explain? We have licenses, we have licenses and we export. It is impossible for me to say whether against such licenses I exported in July or in August, but I suppose it was this, I mean.

Q. We can't have your suppositions, Mr. Lang.

A. I could not make it quite clearer.

Q. Do you know, Mr. Lang, whether or no there was an prohibition made by the secretary of industry and commerce prohibiting the exportation of glucose? A. Yes.

Q. You know? A. Yes.

Q. Do you know whether there was any such prohibition made in the month of May, 1946?

A. No.

Q. Was there any such order made later than May, 1946? A. Yes.

Q. When, if you know? A. In June.

Q. About what time in June, do you remember?

A. It was——

(Testimony of Juan K. Lang.)

Mr. Bronson: Well, I will object to the question. Excuse me a moment, sir. I will object to the question that it calls for hearsay, and I am merely following counsel's objections to the same evidence in the depositions that have already been in evidence from the South American witnesses.

Mr. L. B. Stanton: I can't hear you.

The Court: Read the question to me.

(Last part of record read by the reporter.)

The Court: All this testimony may be made the subject of a motion to strike. When all this evidence is in we can tell whether it is properly admissible or not. Overruled. Did you answer? You may answer the question.

A. 16th of June, our Government on that date proclaimed the campaign of 60 days to reduce the cost of living. In connection with this official campaign it was given a very great publicity. The export of all Argentine raw materials were prohibited for these 60 days. In connection with this the export of glucose, too, was prohibited—let me say, not the export—can I correct? The issuing of new export licenses for glucose was prohibited.

Q. (By Mr. L. B. Stanton): Counsel calls my attention to the reply there. Are you certain whether or not that was made in May or June?

A. I am quite certain it was made in June.

Q. Were licenses granted in May, to your knowledge? [1011]

A. Sure. You have seen them.

Q. Under this rule or order or whatever it was

(Testimony of Juan K. Lang.)

did that affect any case in which licenses had been granted before the 16th of June?

Mr. Bronson: Well, that would call for his conclusion, if your Honor please. We will object to it on that score.

The Court: I think that is beyond the scope of the examination of this witness. He has given us the facts as he knows them, but any interpretation of their effect is beyond the scope.

Q. (By Mr. L. B. Stanton): Do you know what the terms of this order were?

The Court: He has already told us that it forbade the issuance of further licenses.

Mr. L. B. Stanton: Well, I wanted to get the other matter, to find out whether it forbade——

The Court: Well, do not tell him what you want to find out.

The Witness: I can only answer you to my licenses.

The Court: What?

The Witness: As far as my own licenses were concerned which I held in my possession, it did not affect them at all. We continued to export.

The Court: Is there a question here before the witness at the moment? [1012]

Mr. Bronson: Your Honor, I think not. It is a volunteer statement.

The Court: No; there is a question. Let me ask you this question: At the time this order went into effect did you have any unexecuted licenses?

(Testimony of Juan K. Lang.)

The Witness: Yes.

The Court: All right. Did you after the date of the order or the 16th of June export under the license issued before that date?

The Witness: Absolutely.

The Court: Glucose?

The Witness: Absolutely, yes. The Argentine Government never goes back on licenses already granted.

The Court: Already out?

The Witness: Already out. That would be completely unfair.

The Court: All right. Anything else?

Q. (By Mr. L. B. Stanton): Do you know what the condition of the market in glucose was during the months of May and June?

A. Yes. I testified to that.

Q. And what was that condition?

Mr. Bronson: We are going to object to that. That is a new matter, if your Honor please, in this present examination. It is not rebuttal. [1013]

The Court: Yes. Let this witness be examined only in rebuttal and as to matters which were not covered by the depositions. In view of that understanding, I do not think this should be opened up.

Mr. L. B. Stanton: Very well, your Honor.

The Court: I think the statement I made gives adequate grounds.

Q. (By Mr. L. B. Stanton): Do you know the secretary of commerce, Mr. Lagomarsino?

(Testimony of Juan K. Lang.)

A. Ex-secretary.

Q. Ex-secretary? A. Yes.

Q. Did you have business dealings with him during 1946? A. Yes.

Q. Did you discuss with him the matters of exports and export licenses during that time?

A. Yes.

Mr. Bronson: Objected to as incompetent, irrelevant and immaterial, and hearsay.

Mr. L. B. Stanton: Well, we have the situation here of hearsay testimony that somebody went down to some place or other and found somebody that knew something or other about some sort of an order.

The Court: Read the last question, please.

Mr. Bronson: I was addressing my remarks to the court, incidentally, Mr. Stanton. I don't want an altercation with you.

The Court: Very well, read the question.

(Question read by the reporter.)

The Court: I do not see the materiality. I think the only testimony—of course, I am at a disadvantage, gentlemen, in not knowing the full extent of the depositions. But I ruled upon the questions relating to the oral character of these orders and held that if the order was oral, that then the hearsay rule does not apply. But I think this does not call for the existence of the order. The man is not a law expert and any conversations he had with the proper official would be the rankest hearsay and in-

(Testimony of Juan K. Lang.)

admissible for any purpose. I have already allowed him to testify as to the date of the order, to the nature of the order, and also that under the order he was allowed to export under licenses issued previous to the effective date of the order. I think that is as far as this man can go. To talk about conversations later on would not be material at all. I will sustain the objection.

Mr. L. B. Stanton: All right. Pardon me, your Honor. It probably was not later on.

The Court: What was that?

Mr. L. B. Stanton: It probably was not later on.

The Court: Or even at the time. It is not material what he said; it is what he did. If as a matter of fact the exporters were allowed to export despite this order, where they had outstanding licenses, then the interpretation of the order or any conversations become absolutely immaterial. The proof of the pudding is in the eating.

Mr. L. B. Stanton: We are offering this, your Honor, on this proposition: We are met with these three depositions, three men that say they went down to see somebody about something at some time and they were told there was such an order. Now, this is a conversation with the secretary of commerce and labor himself.

The Court: But better proof than the conversation is the fact this man has stated as a fact that he had the three licenses and that under them he was allowed to export; so that we are confronted

(Testimony of Juan K. Lang.)

with the same proposition as a contemporaneous interpretation by action, just as when you are dealing with a contract at times, that is the way people interpret it, by acting under it, and it is much more material than the language in the matter.

Mr. L. B. Stanton: But our contention is there never was any such order and we have to establish that by this witness.

Mr. Bronson: I hardly see how he can deny the existence of something he has already asserted. He said [1016] there was an order. He can't cross-examine his own witness.

Mr. L. B. Stanton: I am not going to cross-examine him at all, my witness. The point here is that these witnesses testified there was an order made on May 1st.

The Court: He has admitted that there was such an order.

Mr. L. B. Stanton: On June 16th.

The Court: He says there was such an order but that it did not apply to licenses which were issued prior to that time. I do not remember the exhibits, but it is my impression that you are claiming under a license issued prior to June 16th.

Mr. L. B. Stanton: May 27th.

The Court: What is that?

Mr. L. B. Stanton: May 27th.

The Court: May 27th. If this witness were available at the time——

Mr. L. B. Stanton: We are likewise faced with

(Testimony of Juan K. Lang.)

a situation that we have a deposition of Mr. Lagomarsino.

The Court: I will sustain the objection. I am saying this: There is no doubt in my mind as to this testimony. I am clearly convinced it is not admissible, but I will put it in. I will allow it to go in merely because of the situation that has arisen, and I will reserve a motion to [1017] strike. It cannot do any harm. I am not likely to be influenced by it, consciously or unconsciously, if I strike it later on.

Mr. L. B. Stanton: May the witness answer the question?

The Court: All right.

Mr. Bronson: What is the question?

(Record read by the reporter.)

Mr. Bronson: I would like to have the time, place, and persons present fixed.

The Court: Yes; let us have more of a foundation for the testimony. First, did you have a conversation about the license? You may answer that "yes," and if you do——

The Witness: Excuse me, but I must again repeat about the time period, if I had any conversation about what time?

The Court: About the time we are talking about. We are talking about the date of the issuance of the order.

A. About the date of the issuance of the order, no.

(Testimony of Juan K. Lang.)

The Court: Well, did you have a conversation afterwards?

The Witness: Afterwards, yes.

The Court: When was that? What date was that?

A. Sometime in August.

Q. (By Mr. L. B. Stanton): Who was present?

A. I saw Mr. Lagomarsino with a delegation of the [1018] chamber of exports.

Q. What, if anything, was said about the matter of the prohibition of exports or the prohibition of licenses?

Mr. Bronson: It strikes me now, your Honor, it is perfectly plain this would be completely after the fact, and his comments and opinions about it, and it is subject to the objection that it would be only conclusion, in addition to the other objections to the statement.

The Court: I am inclined to agree with you, but I am just allowing it to go in for the record because this witness will not be available at the time we close the evidence.

Mr. L. B. Stanton: I will say he will not be. He expects to be back in Buenos Aires on July 3rd, your Honor.

The Court: All right. You may answer.

A. We visited Mr. Lagomarsino, first of all, about all the problems of all the exporters of all Argentine commodities, and this matter was referred to the judgment of the President of the

(Testimony of Juan K. Lang.)

Republic, Mr. Peron; while the problem of glucose was referred to his personnel—how should I say—man in charge of that problem, Mr. Badini, with whom I later took up the questions of export of glucose.

Mr. Bronson: Export of what?

The Witness: Of glucose.

Q. (By Mr. L. B. Stanton): Well, what was said? [1019]

A. At the meeting with Lagomarsino?

Q. Yes.

A. We strongly protested against the prohibitions, that is all.

Q. What did Mr. Lagomarsino say, if anything?

A. Well, he regretted the situation created on the legitimate exporters and said that in all cases where it will be shown that no Argentine interests are violated, export will be admissible again, whilst in all other cases he referred to the judgment of the President of the Republic.

Q. Did you have any conversations with Mr. Lagomarsino before this meeting?

Mr. Bronson: It will be subject to the same objections, if your Honor please?

The Court: Yes. Yes, overruled.

A. I don't believe so.

Q. (By Mr. L. B. Stanton): Did you have any conversation before June of 1946?

A. It might have been. My duties often take me to the secretary of industry and commerce, but most

(Testimony of Juan K. Lang.)

certainly we did not discuss the situation of export prohibition because it did not arrive yet.

Q. Do you know when Senor Peron was elected President? A. In February, 1946. [1020]

Q. And when did he take office?

A. 4th of June, 1946.

Q. In May of 1946 what was the form of Government? A. What was that?

Q. The form of Government in Argentina?

A. It was called a de facto government.

Mr. Bronson: A what?

The Witness: A de facto government.

The Court: A de facto government.

Mr. Bronson: I understand.

The Court: That was Parral?

A. Yes; it was the government of Parral that came out of a military revolution the 4th of June, 1943.

Q. (By Mr. L. B. Stanton): Was it or was it not a fact that this de facto government complied with the laws in force?

Mr. Bronson: I will object, your Honor, as that calls for a conclusion and interpretation of law.

The Court: This man is not an authority.

Q. (By Mr. L. B. Stanton): Insofar as your affairs and business were concerned?

A. Yes, absolutely.

Mr. Bronson: We want to make the same objection. It comes a little late.

The Court: Yes, all right. I will reserve the objection.

(Testimony of Juan K. Lang.)

Q. (By Mr. L. B. Stanton): Do you know what the proportion of the export of glucose that your firm has with other exporters?

Mr. Bronson: Objected to as incompetent to any issue here.

Mr. L. B. Stanton: It just goes to the weight of his testimony, your Honor.

Mr. Bronson: He wants to know what percentage of the glucose business is done by Mr. Lang.

The Court: That does not prove anything. First of all, his character has not been attacked, so you can't bolster it up in advance.

Mr. L. B. Stanton: I am not bolstering it up. I just wanted to give the witness a standing before the court.

The Court: Standing does not mean anything. He is presumed to have standing until his character is attacked.

Mr. L. B. Stanton: It was not his character. The idea was his knowledge of the business, being one of the largest exporters.

The Court: The extent of the business is not material. It is the fact that he has relations which give him knowledge that is material.

Mr. L. B. Stanton: Cross-examine.

Mr. Bronson: When we conclude this I would like to [1022] have your Honor remind me to inform you what information I have been able to get about the date when those rogatory letters will be returned.

The Court: I will.

(Testimony of Juan K. Lang.)

Cross-Examination

By Mr. Bronson:

Q. I will call you "Mr. Lang," not using your formal salutation down there because it is simpler. You arrived here yesterday, I understand, is that true? A. Yes.

Q. You came up here specifically to testify in this case? A. No.

Q. Was that one of your purposes in coming to the United States? A. No.

Q. You gave your deposition, did you not, sometime past in this case? A. Yes.

Q. That is, you answered written interrogatories that were proposed to you? A. Yes.

Q. In looking at the exhibit that is marked 71, that is the group of licenses, they do not refer on the face of the license to the date the application was made; that is [1023] correct, is it not? You can look at them if you want. The clerk will hand them to you.

A. The stamp on the right, I believe on the right side, is the date that the application has been officially received there. That is the date.

Q. Will you point that out to me on the exhibit?

A. Sure.

Q. I am passing him Exhibits No. 71, 71-A, and 71-B. You are pointing to the stamp that is apparently a rubber stamp of date "28 May 1946"—right? A. Yes.

Q. Is that the date that the export licenses issued on?

(Testimony of Juan K. Lang.)

A. No. That is the date it has been applied for.

Q. The document itself with the head "Permiso de Exportacion," that means permit for exportation? A. Yes.

Q. That is the license that you have been referring to, is it not? Now, you are pointing in answer to my question.

A. No valid copy. That is not a license, but it is a copy.

Q. Let me ask you, then: This is a carbon copy of a document that is exactly the same as the original? A. Yes.

Q. Then refer to the original, if you want me to be [1024] that specific. That is, the original of this Permiso represents the license that you have been talking to? A. Yes.

Q. And the date of issuance of the license is this date at the bottom that you refer to, is it not?

A. No. That is the date when we apply for it, not the issuing.

Q. Is there a form called "application for a permit license"? A. That is the form.

Q. Is this the form?

A. This is the form. This form becomes a license when it has the proper stamps and signatures.

Q. Wait just a moment now. Will you produce that exhibit that is an application? If I may, I will look for it. Now I am showing you—and so I will identify it in the record, it bears the tag of the clerk of this Court, "Plaintiff's Exhibit 22" and

(Testimony of Juan K. Lang.)

it is headed "Solicitud de Permiso de Exportacion."
What is that?

A. That is apparently—how should I say—solicitud for the permit of exportation.

Q. It is an application, is it not?

A. Yes.

Q. For a license to export. Do you draw any distinction between that document I am referring to, Exhibit 22 for the plaintiff— [1025]

A. It is one of the copies.

Q. I understand that. Let us forget the distinction between the copies and the originals.

A. No, no, no, no. Excuse me. You got me all wrong. As far as I remember, those are a lot of forms, and I do not see on the forms on the head of our company. As far as I remember this is written all in carbon copies. One of the carbon copies is in white, one is in blue, one is in yellow, one of the carbon copies has a head that says "Solicitud," another carbon copy has a head that says "Permiso," and the third carbon copy that is yellow goes to the custom house.

Q. Then your statement is—and I see that there is a certain identity in the form of the rubrics on here—that the so-called application which I have referred to as Exhibit 22 is a document of which one of the carbons is headed with this "Permiso de Exportacion" and will be handled as the permit itself—right? A. Yes.

Q. Or license?

(Testimony of Juan K. Lang.)

A. It could also be that they used several forms.

Q. All right.

A. Because there are a lot of new forms used.

Q. Let us get this date business because that is what I am getting back to. [1026] A. Yes.

Q. You will notice on this Exhibit 22 which is the application that there is no date line corresponding to the position on the page of the permit form which is Exhibit 71. You notice that, do you not? A. Yes.

Q. You don't know, Mr. Lang, when that date May 28, 1946 is placed upon the carbon that is headed "Permiso" or license? Do you know?

A. It is within one day or two after it is presented. Here, it is not necessary here. It has the same date, see, only from the back side.

Q. It was May 27th on the back side of the document that is numbered Plaintiff's 22——

A. The only difference here——

Q. Just a minute. ——that we have been referring to as an application? A. Yes.

Q. All right. Now, what do they do with this copy that is called "Permiso," that is, the license itself; where does it stay during the time, that is, up until the time that the tax is paid?

A. It stays with the direccion de exportacion.

Q. It is not delivered to you? A. No.

Q. And it is retained there until what time?

A. Until you exhibit the proof of the payment.

Mr. Bronson: I am sorry. I did not quite understand.

(Testimony of Juan K. Lang.)

The Court: And it is not delivered to you until you exhibit the receipt for the payment of the tax?

The Witness: No; until you exhibit the proof of the payment.

The Court: And then it is delivered to you against this slip?

The Witness: Yes.

Q. (By Mr. Bronson): And that is the little slip which, in each case, you have attached?

A. Yes.

Q. A receipt stamp of the Banco Central?

A. Yes.

Q. I notice in the instance of these three permits or licenses, one of them—it is 71-B—is for 150,000 kilos?

A. Yes.

Q. That is the equivalent of 150 tons, is it not?

A. Yes; metric tons.

Q. Those are metric tons. That, according to the permit, has a destination of Switzerland—right?

A. Yes, sir.

Q. The other two were 50 tons and 25 tons, using that [1028] form rather than the kilos, and are for the United States—right?

A. Yes.

Q. Now, you told us a moment ago that you are the head of the company whose name you gave?

A. One of the partners.

Q. And that you did not keep a complete familiarity with the forms that are used. Did I understand that?

(Testimony of Juan K. Lang.)

A. Fairly; I have a great familiarity, may I say, with the forms that are used.

Q. Well, following these applications through the department, you say you send an employee over to see that they go from department to department within that secretariat for expediting the issuance of the license—correct? A. Yes.

Q. Do you know that that was done in this case?

A. Absolutely it is done in all our licenses.

Q. Done in all of them?

A. It is the normal procedure, normal office procedure.

Q. Let us get at it this way. You say you know it was done and you base that upon the fact that you have a routine in your office? A. Yes.

Q. But I am talking about your own knowledge as to when you made an application for these licenses and when they [1029] were issued. Well, let me point this out to you. Had you brought in the top copy, which is the application for the license, the reverse of it would have shown the date of the application, would it not?

A. I suppose so, but I cannot testify to that because there are several forms used and I cannot know exactly what form in this particular case my office used.

Q. The forms are printed and prepared by the secretariat of your government? A. Yes.

Q. You have them in your office but only by getting them from that source? A. Yes.

(Testimony of Juan K. Lang.)

Q. You said that you had great familiarity with these forms? A. Yes.

Q. Aren't you able to testify positively that the top copy, that is, the so-called *Solicitud* or application carries the date upon which it is made? I am asking you to look at this Exhibit 22 to help your memory on it.

A. Yes. And I am now replying to you. Our secretariat uses several forms because they had a big supply of old forms. Therefore we are using sometimes the older forms, sometimes the newer forms. I don't know exactly whether the older form that you have now, the blue one has [1030] date here which is applied to it with the machine. It can also be applied to it with a rubber stamp. I know that these rubber stamps are placed over there in the *Direccion de Exportacion* when they come in, and the date of the payment of the fee is the date that the license has been granted. It is the date we hear such a license is ready, pays the fee and withdraws the license.

Q. You will excuse me. I am afraid you are going a little beyond my question. I do not mean to interrupt you but we are in a hurry here. Let me ask you this: When was it that you were asked to bring up these documents that are now marked here Exhibits 71, 71-A, and 71-B?

A. The one I hold in my hand, when was I asked?

Q. Yes; when were you asked to bring this up here? A. I did not bring them.

(Testimony of Juan K. Lang.)

Q. You did not bring them? A. No.

Mr. L. B. Stanton: Is there any question?

Mr. Bronson: He had hesitated.

The Witness: No, no, no. I tried to remember the date. It was rather far away. I didn't bring them. Mr. Stanton brought them.

Q. Oh, Mr. Stanton brought them. When did he bring them?

A. Well, he must know that, not me. [1031]

Q. No, no. Did you see him down there in the Argentine? A. Of course.

Q. How long ago was it?

A. Well, it was last year. I suppose so.

Q. All right. It was at the time that these depositions were taken on written interrogatories, wasn't it? A. Yes.

Q. All right. Now, did he ever ask you for the copy of this document which is, according to you, the top one, and it is headed "Solicitud," application for permit license? Did he ever ask you to supply your copy of that? A. No, no.

Q. Has he at any time since then asked you to supply, so that we could observe the date that the application was made?

A. No; because this is the application.

Mr. Bronson: I did not get the answer, Mr. Reporter.

(Answer read by the reporter.)

Q. Yes; I understand it is the application, but

(Testimony of Juan K. Lang.)

the one I am showing you has to do with some business that you are not concerned with?

A. No.

Q. It was issued—it was applied for by Engraw, Compania Engraw. So you have never been asked—this is [1032] only to recapitulate—you have never been asked by anybody to present or to exhibit any document representing the application for the licenses represented by these Exhibits 71, 71-A, and 71-B?

A. This represents the application. I repeat to you we never made a separate application.

Q. I am not going to quarrel with you. I am just pointing out it is “Permiso” not application.

A. Yes; because this is only the third copy of that. There are two other copies of it and I don’t know whether on the other copies the printed forms say “Solicitud” or “Permiso.” I don’t know.

Q. Mr. Lang, only one other question on that subject. A. Sure.

Q. You have no independent knowledge of your own of the date that that application was put in?

A. Yes. I can tell it was within two days, a day or two days before the date stamped on that.

Q. That you base on the circumstances that you have an office routine? A. Yes, sir.

Q. That sees to it that they are rushed through very rapidly. All right.

A. I don’t go there personally. This I admit.

Q. I assumed you were not the office boy down there, [1033] Mr. Lang.

(Testimony of Juan K. Lang.)

The Court: All right.

Q. (By Mr. Bronson): Do I understand that you did not get the licenses in your hands until the date or after the date shown by the receipt for the tax?

A. We did not get it before. We did not have in our hands the receipt for the tax yet.

Q. Actually, the licenses are issued by the secretariat down there within 180 days or six months limit normally, are they not?

A. 180 days at that time.

Q. At that time. Had you any licenses in effect covering glucose issued prior to May 1st, 1946?

A. Yes.

Q. When were they used?

A. Always. We export glucose always.

Q. Do you wait as a matter of routine to get an actual order for goods before you ask for the license?

A. We have to. It is a law.

Q. You have to have an order, an actual destination before you apply, is that true?

A. You will see on the license that we have to give the exact f.o.b. value of merchandise in order to pay the fee. Obviously you can't give an f.o.b. value if you don't know your sales price. Therefore, licenses can only be issued [1034] when you have an order and can only be applied for when you have an order.

Q. Does the secretary require you to make some showing or voucher of that?

(Testimony of Juan K. Lang.)

A. Well, with firms of good standing generally not. Sometimes they do, and if they find something wrong, it is just too bad for the man.

Q. Well, let me get this: In your case you did not make any voucher showing the orders in the cases represented by these documents?

A. This I couldn't tell you. This is a question of office routine. If when applying for a license we are asked to show our vouchers, we show them.

Q. I want to call your attention to your deposition here. I think I can do it from here, and I ask that counsel follow me.

Mr. L. B. Stanton: I ask that he be permitted to see his deposition.

The Court: He may ask the question first.

Mr. Bronson: The depositions are in evidence. I am going to read one of his answers to the interrogatories.

Q. Now, shipments under these permits that are in evidence here, totaling—or, rather, specifically, 150,000 kilos to Switzerland; the other two, 50,000 and 25,000, to the United States, were made at some day after July 11th? [1035]

A. June 11th.

Q. June 11th, when you paid the tax. All right. Listen to the answer that you gave to the seventh cross-interrogatory, which was the Plaintiff's interrogatory No. 18.

Mr. L. B. Stanton: I ask that the witness be shown the document.

(Testimony of Juan K. Lang.)

Mr. Bronson: Well, it is better. I am just going from a photostatic copy. I will take that up, if it is agreeable. It has got the signatures and everything in the photostat.

The Court: All right.

Mr. Bronson:

“We made the following export shipments all for pure corn glucose testing from 43° to 45° Baume packed in wooden barrels: in May, 1946——

I will leave that out.

“in June, 1946, 54,776 kg to the U.S.A.”;

The Witness: 74,866 kilograms.

Mr. Bronson:

“to the U.S.A.; 74,866 kg to Switzerland”;

and then something to Palestine which I will leave out.

“in July 1946, nothing—in August 1946, 104,310 kg to the U.S.A.; 59,699 kg to Switzerland—in September 1946, 97,822 kg to the U.S.A.; 6,150 kg to Switzerland”;

omitting Palestine. [1036]

Without going further, you go ahead and cover your shipments of glucose clear down to April, 1947. What is your explanation for the differential between the tonnage that was covered on these exhibits and what I have read to you from your testimony last year?

(Testimony of Juan K. Lang.)

A. You mean why our——

Mr. L. B. Stanton: I do not believe there is any discrepancy, counsel.

Mr. Bronson: Just a minute.

The Court: He has a right to answer.

A. Why the quantities that we shipped apparently are discrepancies with the quantities of licenses?

Mr. Bronson: That is right.

A. We always hold export licenses for our different customers. Now, here are the total quantities. This is just one or two licenses. We didn't show, of course, all the information to Mr. Stanton, all our export licenses. There was no reason for that. He just asked for a few of them.

Q. When did you apply for your next export license after these in May, that is glucose, of course? You keep in mind I am only interested in glucose.

A. After May, the 28th of May, we applied, and after that I couldn't tell you now if we applied in June for something, but the next regular export licenses from newly [1037] sold merchandise—that means merchandise sold after June 16th—we only made late in August or in September, when, after several discussions with the committee of three gentlemen, Mr. Lagomarsino decided to make, first, one decree, and then another decree that authorized the export of glucose again.

(Testimony of Juan K. Lang.)

Q. Actually, that restriction was removed in September of 1946, was it not?

A. Yes; sometime early in September.

Q. There is one further question on that subject that I addressed to you last. I was roughly totaling up the shipments, beginning in May, to the United States, for instance. I will put it in tons because it is easier to carry. A. Sure.

Q. That would be just to drop off the last three zeros as they show in the answer I just read to you. In May 62 tons to United States; in June, 54 tons to the United States; in July, none; in September, 97 tons. Now, that would represent for those months up until the first of September 213 tons, of which 116 were in May and June and 97 were in September. Is it your testimony that some of that shipment during the months of June, July, and August of glucose to the United States was on permits received before May 1st, 1946? [1038]

Mr. L. B. Stanton: He didn't say that. I object to that.

Mr. Bronson: I am asking him.

Mr. L. B. Stanton: I object to that as misstating the record.

The Witness: Let us get it clear.

Mr. Bronson: The court will rule on it. The question is a simple one, whether any of your shipments in those three months were made on export licenses which were effective before May 1st, 1946.

A. Could have been, could not have been. I don't know.

(Testimony of Juan K. Lang.)

Q. You don't know?

A. The license is valid six months.

Q. When you gave the date of June 16, 1946, as the effective date of this verbal order, will you state the source of that information?

A. I would never give it as the date for the verbal order. I only said that on the date the campaign for 60 days officially started and every export prohibition went officially into effect only with the campaign of 60 days. Before that date there was officially and to our knowledge no export prohibitions of a general nature.

Q. Why do you qualify it that way, when you say "of a general nature"? [1039]

A. There are articles in Argentina that are always prohibited for export.

Q. I don't hear you.

A. There are certain articles in Argentina that are generally prohibited for export.

Q. Yes. But let us stay on glucose, if you do not mind. That is what this is all about. Let us keep out of conclusions now. You stated "of a general nature." You mean regarding glucose?

A. No, no; regarding all commodities. Regarding glucose this came only into force, in my opinion, on the 16th of June.

Mr. Bronson: I will ask that the last part, "in my opinion," go out, if your Honor please. He is expressing an opinion here, obviously.

The Court: Yes; that may be stricken.

(Testimony of Juan K. Lang.)

Q. (By Mr. Bronson): Now, was there any restriction on glucose to your knowledge effective before June 16, 1946?

A. To my knowledge?

Q. Yes. A. No.

Q. You mean you do not have any definite knowledge of it? A. I have no knowledge.

Q. I will ask you again where did you get your information about June 16th being the effective date? A. Out of the newspapers.

Q. Out of a newspaper? A. Sure.

Mr. Bronson: I will ask that that go out, if your Honor please. That is not evidence, I am sure.

Mr. L. B. Stanton: Pardon me. May it please the court—

Mr. Bronson: Let me ask him, before I resume the objection—let me withdraw it—if you don't mind, this way:

The Court: All right.

Q. (By Mr. Bronson): Have you got the newspaper with you? A. No.

Q. Did you make any search for the newspaper article? A. No.

Q. Before you came up here?

A. May I try to explain to you?

Q. Yes.

A. I want to explain just a little bit. The new government came into force on the 4th of June. The new government started something new on the 16th of June; so the display of it was unusual in

(Testimony of Juan K. Lang.)

Argentina, over all radio stations, over all newspapers, over everywhere the campaign of 60 days came into force. It was about the biggest thing that happened to Argentina in the last three or four years. So this was the official date for everything that was connected with export.

The Court: In other words, this fact was made public in various ways, is that it?

The Witness: Radios and newspapers.

The Court: All right.

Q. (By Mr. Bronson): Technically, how long before that had this order been in force, if at all?

A. I don't know about any order.

Q. By the way, before you came up, when did you leave the Argentine?

A. I left the Argentine on the 12th of February this year.

Q. You are acquainted with Mr. Lagomarsino or the gentleman to whom you referred?

A. I am.

Q. Did you discuss any of these subjects with him or make any effort to refresh your recollection with Mr. Lagomarsino before coming up here on the subjects which you have testified to?

A. I haven't seen Mr. Lagomarsino since August or September, 1946.

Q. Mr. Lang, you have got an interest in the outcome of this suit, have you not? [1042]

A. Indirectly, yes.

Q. And that arises out of a contract that was

(Testimony of Juan K. Lang.)

entered into settling and composing a matter that had been submitted to an arbitration of the Bolsa de Comercio in Buenos Aires, and it is your testimony that you did not seek out your friend, Mr. Lagomarsino, before coming up here?

A. I didn't say that he was my friend, too.

Q. Well, your acquaintance. Let us not split hairs. You did not seek him out on any subject of your inquiry before coming up here?

Mr. E. B. Stanton: We will stipulate he did not know he was coming into court when he came up.

Mr. Bronson: We don't know anything about it.

Mr. E. B. Stanton: Until you got those American depositions which set forth these facts set forth here, otherwise he could have brought some of these things that you holler about.

Mr. Bronson: All right; I think that concludes our cross-examination.

The Court: Any redirect? Just a minute.

Mr. E. B. Stanton: I have a couple of questions.

The Court: We do not allow switching of attorneys on the examination.

Mr. E. B. Stanton: Very well, thank you.

The Court: Your father may do it. But we do not do that ordinarily. [1043]

Mr. E. B. Stanton: That is all; no further questions.

The Court: All right, Mr. Lang, you may step down.

Mr. Bronson: After the recess on Friday of last week I sent a cable to the corresponding attorneys for the defendant in South America and received a cable since then stating:

“Your cable June fourth depositions not yet taken regret but believe rogatory letters will not be ready before sixty days we are rushing as much as possible.”

That is what we had asked them to do, to rush, and that is the response we received. I know your Honor is concerned about that and that is why I suggested it.

The Court: Yes. The main point is this: I can't keep this case open indefinitely. I have to continue it to some definite time for further proceedings and conclusions. That is the reason.

(Discussion of court and counsel as to duration of continuance omitted from transcript.)

The Court: I do not think it should take us more than a day to finish. The answers are here. I could read them. All that remains is to pass on any motions that may come up and hear the arguments.

We might do this, although, as I told you before, I prefer an oral argument. You were kind enough to furnish me [1044] with a transcript in this case. I am going to read all the depositions and I am not likely to forget it, with the aid of a transcript. We could submit this matter on the testimony in the record and the answers that may arise, the answers to interrogatories, and allow you to brief it and give

you a long enough time to take into consideration the possible delay. And if after I consider the matter I desire oral argument, I will call for oral argument, the matter to stand submitted as of not later than a certain date.

(Further discussion.)

The Court: If there is nothing before the court except the ruling on these motions, I could make a record so that we would not have to come down just for ruling on the motions.

Mr. Bronson: As I understood your Honor the other day, you expressed the desire to have oral arguments.

The Court: Yes.

Mr. Bronson: You still want them, I understand?

The Court: No. I am just trying to get around it by saying in view of the long delay it would be much better to have briefs, so that briefs could be presented. If I allow you the full two months, for instance, and I provide that the opening brief shall be filed, let us say, by the 9th of August, that gives you full 60 days, and give the plaintiff the right to open and give the plaintiff, say, until the 25th of August to file the opening brief, that gives you 14 days. That gives you two whole weeks. Or give the plaintiff 10 days, say until the 21st to file the opening brief, give you 10 days until the 31st of August, and then give the plaintiff 5 days to reply, or even if I give him 10 days to reply, that takes you to the 10th of September. That means that by

the time I get back here it will be not later than the 13th of September and the case will be ready.

Mr. L. B. Stanton: Your Honor, you are forgetting the fact that these depositions will probably not be back by the time.

(Further discussion.)

Mr. Bronson: May I make a suggestion, your Honor? Since the things Mr. Stanton is talking about are contingencies (No. 1) whether the thing is back in 60 days; (No. 2) whether he wants to rebut it by further depositions, can we make some order now such as your Honor suggested on briefs and then leave it for the further development of the happenings or contingencies to make any change?

Mr. L. B. Stanton: I would appreciate the matter if your Honor could put the hearing on oral argument, and then, as your Honor suggested some time since, if you wish for further information then we could put in briefs.

The Court: Of course, that would mean further delay. I will tell you what I will do. I don't like it, as a rule. Did you file any trial briefs here?

Mr. L. B. Stanton: There is a short trial brief.

The Court: Supposing we do it this way: Ordinarily I do not like simultaneous briefs because, as a rule, you are missing each other's answer which is very important. I remember I took one case under such a situation, took it over from the late Judge James after his death, and I found that it was so unsatisfactory that ultimately I had to

give them time to reply. So instead of having two briefs or at most three, I had five.

But in a case like this where the evidence is already in, it could be done by saying this: That we will set it for oral argument in September, say, either the 13th or the 20th. The 13th, of course, will be the first day I am back and probably will be a very busy day. Or I could even set it for the 20th and devote the entire afternoon to it. Briefs shall be filed, and if each of you has filed on or before that date briefs setting forth your views in the light of the testimony that is in the record, that is about the only way we can do it without giving a time limit. And then, of course, by the time you appear before me you will know what portion of the brief you want to answer. You do that in oral argument.

Mr. Bronson: Not if your Honor's order is "on or before." I am afraid we will get it "on" rather than "before." Let us get it in "before." [1047]

The Court: Well, before. And then if the brief of each calls for comment, you can file a supplemental brief, agree among yourselves, or file a supplemental *breach* so all of them reach me at that time. Then, you see, in that manner there will be no need for additional time. As it is, I do not need to submit the case, you see.

(Further discussion omitted from transcript.)

The Court: Supposing we do it that way and we will continue further proceedings to the 20th

of September, then oral argument at the time, and then I will hear any objection that you may have to any of the answers to the letters rogatory and renew your objection to this case, with the additional understanding that the case is to be argued at the time and that before that time there will be filed with the clerk by each side a brief setting forth their interpretation of the facts and the law of the case.

Mr. L. B. Stanton: How long before, your Honor?

The Court: Well, I was going to say "on or before." We will make it a week before or, put it this way: Before the 10th of September. That will mean that I shall have time to examine them before we have the oral argument.

Mr. L. B. Stanton: Lawyers are usually dilatory about putting things off to the last minute.

Mr. E. B. Stanton: Each side is briefing the case as they see it? [1048]

The Court: As you see it; yes. And, of course, you have a very good idea from some of the discussions that we have had what points the other side are relying on and what you are relying on.

Mr. E. B. Stanton: Assuming that these depositions come up and we wish to make application, your Honor, for the right to take further depositions by way of our rebuttal what would then be our procedure?

The Court: That is what I say, you will make your application at that time.

Mr. E. B. Stanton: That is September 20th?

The Court: That is right. But you can write your brief anyway. That is why I say I am merely continuing it for further proceedings, for further proceedings and oral argument, for further proceedings, oral or documentary, and receipt of depositions and oral argument.

We shall continue it for further proceedings to September 20th, with the understanding at that time any objections that are reserved may be made; that any objections to the interrogatories, assuming they have arrived, will be presented; and also, that on or before the 10th you will each file a brief. Supposing something arises and these depositions are not here, I am not foreclosing you.

However, I will say this, in justice to all parties: In taking into consideration my desire, I do not like to take [1049] this case for too long a time. I think we will have to leave it just as it is. If you desire to make any further application, unless counsel will stipulate—if he will stipulate, then you do not need to wait until that time. If you feel you want to take additional depositions, we ought not to lose time, otherwise the case will drag along to next year.

Mr. L. B. Stanton: I think counsel probably would stipulate. We have gotten along with counsel very well.

The Court: I think you did all right. Then that will be the understanding: The case continued for further proceedings until 10:00 o'clock

September 20th, with the understanding between court and counsel that I have already stated for the record.

The Clerk: Do you wish that at 10:00 o'clock a.m. or 2:00 p.m., your Honor?

The Court: We will have it 10:00 a.m.

(Whereupon a continuance in the above-entitled matter was taken until 10:00 o'clock a.m. of September 20, 1948, for further proceedings.) [1050]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 11th day of June, A.D., 1948.

/s/ ALBERT H. BARGION,

/s/ THOMAS B. GOODWILL,

Official Reporters.

[Endorsed]: No. 12261. United States Court of Appeals for the Ninth Circuit. Compania Engraw Commercial E. Industrial S. A., a Corporation, Appellant, vs. Schenley Distillers Corporation, Appellee, and Schenley Distillers Corporation, Appellant, vs. Compania Engraw Commercial E. Industrial S. A., a Corporation, Appellee. Transcript of Record. In Four Volumes, Vol. I. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 10, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 12261

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A., a corporation,
Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a
corporation,
Appellee.

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the Above Entitled Court, to Appellee, and to Messrs. Bronson, Bronson & McKinnon, Attorneys for Appellee:

You and Each of You Will Please Take Notice that, in accordance with the provisions of Subdivision (a) of Rule 75 of the Federal Rules of Civil Procedure and Rule 19, Subdivision 6 of the Rules of the Ninth Circuit, appellant hereby designates the portions of the record which are material to the consideration of the appeal, as raised by the Concise Statement of Points, upon which appellant intends to rely, served and filed herewith, as follows:

Pleadings and Proceedings	Page of Record
Amended complaint	16
Answer to amended complaint	39
Amendment to amended complaint	49
Order authorizing filing of amendment to amended complaint	52
Decision or opinion of the Court	53
Findings and conclusions of law	57
Judgment	64
Notice of motion to amend findings under Section 52-b	66
Motion to amend findings under Section 52-b .. (Omit from record points and authorities attached to motion.)	67
Notice of motion to amend judgment under Section 59-e	77
Motion to amend judgment under Section 59-e.. (Omit points and authorities attached thereto.)	78
Order denying motions under Sections 52-b and 59-e	82

Appellant's notice of appeal	83
Designation of contents of record made in District Court	86
Order on transmittal of record	99
Certificate of Clerk to record	99

Evidence

All that certain portion of the evidence in said cause contained in the Reporter's Transcript of Proceedings, and particularly designated by page and line as follows:

R 17 1. 5 to 25	127 1. 1 to p. 132, 1. 14
18 1. 1 to 9	158 1. 18 to 1. 22
28 1. 2 to 19	160 1. 2 to 1. 14
30 1. 16 to p. 31, 1. 3	167 1. 19 to p. 168, 1. 22
42 1. 24 to p. 43, 1. 22	169 1. 10 to 23
43 1. 23 to p. 44, 1. 14	170 1. 8 to p. 172, 1. 19
44 1. 20 to p. 45, 1. 6	186 1. 22 to p. 190, 1. 21
52 1. 3 to 6	219 1. 5 to p. 220, 1. 23
90 1. 2 to 8	220 1. 3 to 1. 21
91 1. 7 to 10	221 1. 13 to p. 222, 1. 5
95 1. 1 to p. 96, 1. 24	227 1. 7 to 20
97 1. 1 to p. 98, 1. 16	228 1. 18
99 1. 1 to p. 101, 1. 26	229 1. 18 to 23
102 1. 2 to p. 104, 1. 3	230 1. 7 to 19
105 1. 1 to p. 106, 1. 14	231 1. 21
107 1. 16 to p. 109, 1. 3	232 1. 1 to 11
114 1. 3 to p. 116, 1. 18	232 1. 17 to 21
117 1. 6 to 1. 14	233 1. 17 to 21
118 1. 3 to 1. 12	234 1. 16 to 22
123 1. 1 to p. 126, 1. 22	235 1. 12 to 24

- | | |
|----------------------------|----------------------------|
| 235 1. 25 to p. 236, 1. 25 | 281 1. 16 |
| 237 1. 3 to 7 | 282 1. 10 and 11' |
| 238 1. 1 to 4 | 286 1. 2 to 20 |
| 238 1. 20 to 24 | 287 1. 2 to 9 |
| 240 1. 10 to 1. 13; 1. 25 | 300 1. 1 to p. 306, 1. 18 |
| to p. 241, 1. 8 | 309 1. 4 to 6 |
| 242 1. 15 to p. 243, 1. 25 | 312 1. 6 to 1. 24 |
| 244 1. 25 to p. 245, 1. 5 | 314 1. 7 to 13 |
| 245 1. 22 to p. 246, 1. 11 | 315 1. 15 to p. 316, 1. 10 |
| 251 1. 2 to 21 | 341 1. 3 to 17 |
| 252 1. 7 to p. 253, 1. 20 | 347 1. 13 to 19 |
| 254 1. 10 to 16 | 350 1. 14 to 22 |
| 255 1. 12 to p. 256, 1. 21 | 362 1. 5 to p. 365, 1. 7 |
| 256 1. 22 | 365 1. 8 to 12 |
| 257 1. 3 to 25 | 368 1. 2 to 12 |
| 258 1. 1 to 7 | 374 1. 1 to p. 376E 1. 21 |
| 260 1. 7 to p. 261, 1. 12 | 384 1. 22 to 24 |
| 261 1. 13 to 16; 1. 24 to | 385 1. 17 to 19 |
| p. 262, 1. 9 | 392 1. 29 to p. 393, 1. 22 |
| 262 1. 12 to 16 | 396 1. 3 to 398, 1. 25 |
| 263 1. 20 to p. 264, 1. 23 | 401 1. 5 to 1. 21 |
| 264 1. 24 to p. 265, 1. 6 | 403 1. 1 to 1. 12 |
| 265 1. 14 to p. 266, 1. 2 | 407 1. 1 |
| 266 1. 5 to 1. 7; 1. 14 | 432 1. 17 to 24 |
| to 1. 25 | 433 1. 16 to p. 434, 1. 22 |
| 269 1. 1 to 2; 1. 6 to 1. | 435 1. 1 to 16 |
| 15; 1. 20 to 23 | 467 1. 21 to 26 |
| 270 1. 24 to p. 271, 1. 2 | 469 1. 22 to p. 470, 1. 1 |
| 271 1. 8 to p. 272, 1. 16 | 470 1. 2 to p. 471, 1. 20 |
| 273 1. 20 to p. 275, 1. 6 | 479 1. 10 to 14 |
| 280 1. 4 to 1. 24 | 480 1. 20 to p. 482, 1. 5 |

482 1. 6 to p. 483, 1. 7	561 1. 15 to 19
491 1. 11 to 15	562 1. 1 to 25
492 1. 18 to p. 484, 1. 7	563 1. 1 to 22
494 1. 8 to p. 495, 1. 10	565 1. 1 to 19
503 1. 10 to 12	574 1. 15 to p. 575,
504 1. 15 to p. 505, 1. 10	1. 10
505 1. 19 to p. 506, 1. 6	576 1. 5 to 25
513 1. 17 to 19	580 1. 3 to 18
514 1. 11 to p. 515, 1. 18	593 1. 7 to p. 595, 1. 14
515 1. 19 to p. 516, 1. 2	595 1. 1 to 14
516 1. 13 to 18	612 1. 1 to 8
519 1. 22 to p. 520, 1. 14	668 1. 4 to 13
529 1. 22 to 24	672 1. 4 to p. 673, 1. 14
530 1. 21 to p. 531, 1. 1	684 1. 22 to p. 685, 1. 4
532 1. 22 to p. 533, 1. 10	686 1. 11 to 12
533 1. 17 to 19	692 1. 3 to 24
535 1. 2 to 536, 1. 5	790 1. 10 and 11
536 1. 15 to 23	800 1. 21 to 24
538 1. 5 and 6	852 1. 1 to 19
539 1. 16 to p. 540, 1. 10	871 1. 1 to p. 872, 1. 6
541 1. 6 to 10	873 1. 1 to 22
542 1. 17 to 20	876 1. 1 to 13
545 1. 4 to 10	
560 1. 10 to 19;	
1. 23 to 25	

All that certain portion of the evidence in said cause contained in the Reporter's Transcript of Proceedings, and particularly designated by page and line, as follows:

Exhibits

1, 2, 3, 4, 5, 6, 11, 12, 13, 14, 19, 21A, B, C, D, E,

F, G, 27, 28, 29, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 48, 50, 52, 53, 58, 59, 59A, 60A, B, C, D, E, F, G, R1, R2, R3.

Dated: This 15th day of June, 1949.

STANTON & STANTON,
By LOUIS B. STANTON,
Attorneys for Appellant.

(Affidavit of Service by Mail, attached.)

[Endorsed]: Filed June 17, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the Above Entitled Court, to Compania Engraw Comercial e Industrial S. A., a corporation, Appellant and Appellee, and to Messrs. Stanton & Stanton, its attorneys:

You and Each of You Will Please Take Notice that, in accordance with the provisions of Subdivision (a) of Rule 75 of the Federal Rules of Civil Procedure and Rule 19, Subdivision 6 of the Rules of the Ninth Circuit, appellee and appellant hereby designates the portions of the record which are material to the consideration of the appeal, as raised by the Concise Statement of Points, upon which appellee and appellant intends to rely, served and filed herewith, as follows:

Pleadings and Proceedings

1. Original complaint.
2. Defendant's motion to dismiss and order denying same.
3. Amended complaint.
4. Defendant's motion to dismiss and order denying same.
5. Amendment to amended complaint.
6. Order permitting filing of amendment to amended complaint.
7. Answer to amended complaint.
8. Decision and Comment (opinion) of the Court.
9. Findings of fact and conclusions of law, together with the direction of the entry of judgment thereon.
10. Judgment.
11. Stipulation re transmittal of record and order re same.
12. Motion to amend findings under Rule 52-b.
13. Motion to alter and amend judgment under Rule 59-e.
14. Order denying motions under Rules 52-b and 59-e.
15. All notices of appeal with dates of filing.
16. Designation of contents of record made in District Court.
17. Order on transmittal of record.
18. Certificate of Clerk to record.

Evidence

1. All original exhibits filed in said action.

2. Entire Reporter's Transcripts of testimony taken on the trial of said action, including the depositions and exhibits transcribed therein.

Dated: June 17, 1949.

BRONSON, BRONSON &
McKINNON,

By EDGAR H. ROWE,

Attorneys for Schenley Distillers Corporation, Appellee and Appellant.

[Endorsed]: Filed June 17, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANT INTENDS TO
RELY UPON THE APPEAL

Appellant Schenley Distillers Corporation intends to rely upon the following points on this appeal:

1. As a matter of law, no contract was created between the parties; and the Trial Court erred in finding (Finding 4) that a contract existed because, among other things, the evidence conclusively shows that:

(a) a contract would be created, if at all, only by formal purchase order;

(b) the existence of any contract was subject to the issuance and execution of a purchase order and the issuance of a covering letter of credit;

(c) there was never at any time a meeting of

the minds with respect to material elements of the alleged contract;

(d) there was no absolute, unequivocal acceptance by Schenley Distillers Corporation of any offer made by Compania Engraw Comercial & Industrial S. A.;

2. The evidence shows that Whipple was not, as alleged by Compania Engraw and as found by the Trial Court, the agent of Compania Engraw, but was in fact independent, without authority to represent, act for or bind Compania Engraw, and was dealing with Compania Engraw as a principal, and for his own benefit and account, and at his own risk.

3. The evidence shows that Compania Engraw could not have performed the alleged contract, and the Trial Court erred in finding (Findings 5 and 12) to the contrary; that even assuming the existence of the alleged contract, therefore, Compania Engraw failed to prove or establish any right to recover on the basis thereof.

This notice is given and statement made pursuant to the provisions of Subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure and of Subdivision (6) of Rule 19 of the Rules of the above entitled Court.

Dated: June 17, 1949.

BRONSON, BRONSON &
McKINNON,

/s/ EDGAR H. ROWE,

Attorneys for Appellant, Schenley Distillers Corporation.

[Endorsed]: Filed June 17, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANT INTENDS TO
RELY UPON THE APPEAL

1. The purchase contract, as found, was for delivery of 1135 tons of glucose on a definite shipping schedule of seven distinct delivery dates. By reason of the notice of repudiation, appellant was entitled to have damages determined as of the date of each of the respective delivery dates. The court accordingly erred in fixing the sole date for determination of damages as the date of the notice of repudiation, June 6, 1946.

2. The contract herein, among its terms, provided for the rate of exchange to be employed at 335.82 Argentine pesos to 100 American dollars. The court accordingly erred in fixing the rate of exchange at \$.206 or 4.85 pesos to the dollar.

3. The court erred in determining that there were two market prices, one for consumption and one for export; that such finding is contrary to the evidence, which was that there was only one market price.

4. The court erred in that portion of Finding 8, wherein it found in respect to the domestic and export market that "such prices bore no continuing or constant relations to each other," and that such finding is contrary to the evidence, as the entire evidence showed that the market price for glucose and the cost of delivery on board ship in the Harbor of Buenos Aires actually bore a continuing

and constant relationship to each other, in that the cost of said transfer was a continuing 15 centavos per kilogram in excess of the domestic market price, and that such cost involved the transfer of the goods, packaging, stevedoring, taxes and incidental expenses.

5. The court erred in making that portion of Finding 8, wherein it found "the established market price for such glucose for and during the whole of the month of June, 1946, for export f.o.b. steamship Buenos Aires, Argentina, was the sum of 1.35 pesos per kilo, which market price was 15c higher than the then domestic price of 1.20 Argentine pesos per kilo," and that the sole evidence produced in the case showed that the market price for glucose in Buenos Aires during the first part of the month of June, 1946, was 1.20 Argentine pesos per kilo, and that it cost 15 centavos per kilo to transfer said glucose in the Argentine market f.o.b. steamship Buenos Aires Harbor. The evidence further showed that in the latter part of June, 1946, the market price dropped to approximately 60c per kilo.

6. The court erred in its finding, in that portion of Paragraph 8, where it is found as follows:

"The established market price for such glucose during the whole month of September, 1946, for export f.o.b. Buenos Aires, Argentina, was the sum of 1.25 pesos per kilo, which market price was 15 centavos higher than the then domestic price of 1.10 Argentina pesos per kilo,"

in that said finding is contrary to the whole evidence, and that the evidence shows that the estab-

lished market price for glucose in the Argentine market during the month of September, 1946, was the sum of 60 centavos per kilo; that it cost 15 centavos per kilo to transfer said glucose to the Buenos Aires market to f.o.b. steamship in Buenos Aires Harbor.

7. The court erred in making that portion of Finding 8, where it is found as follows:

“The total market price for glucose of the same amount and quality, as specified in said contract for export f.o.b. steamship Argentina, on June 6, 1946, was the sum of 1,532,215 Argentine pesos,” in that said finding is contrary to the evidence and the law. The evidence establishes in this case that the market price for glucose during the latter part of the month of June was approximately 60 centavos per kilogram. The evidence establishes that the market price of the glucose in the respective months of delivery under the contract was at the rate of approximately 60 centavos per kilogram; that in fact, the market price for the various delivery dates was approximately 8,000,000 pesos.

8. The court erred in making that portion of Finding 7, wherein it found that:

“Defendant did not actively or continuously or otherwise negotiate with plaintiff during said period (between June 6, 1946, and September 18, 1946), or at any other time for the completion or restoration of said contract or deliveries thereunder; that at all times it maintained its claim that no contract existed between it and plaintiff and at all times

definitely refused to accept any deliveries under or pursuant to said contract,”

in that said finding is contrary to the sole evidence introduced in said cause.

9. The court further erred in its findings, in that portion of Finding 7, wherein it found as follows:

“At no time did defendant encourage, induce or otherwise cause or lead plaintiff to defer or postpone any action it might have taken for the disposal of said glucose,”

in that said portion of said finding is contrary to the sole evidence introduced in said cause.

10. That the court erred in failing to find the market prices on the contract delivery dates.

11. That the court erred in failing to find the market price on the date of final disposition of the glucose.

12. That the court erred in finding that the notice of repudiation of contract given on June 6, 1946, was or acted as an anticipatory breach of said contract; that the sole evidence and the facts and law produced establish that the anticipatory breach took place on September 20, 1946.

13. That the court erred in finding that portion of Finding 8, wherein it found as follows:

“Plaintiff has been damaged as a direct result of the repudiation of said contract by defendant in said sum of 28,375 Argentine pesos,”

in that the uncontradicted evidence and the law in said cause provided that, taking the market values of glucose as of the dates under which said

glucose ought to have been delivered, appellant suffered damage by reason of the breach of appellee in the sum of \$211,224.08.

14. The court failed to find on material issues set forth in the second cause of action and on the evidence produced thereunder that appellant was unable to dispose of the glucose until April of 1947; that the market price of said glucose during the month of April, 1947, was the sum of 52 centavos per kilogram; that the cost of transference on board ship Buenos Aires Harbor during said month was the sum of 15 centavos, which made a total price placed on board steamship of 67 centavos per kilogram; that thereby, appellant was damaged in the sum of \$238,225.97.

15. That the court erred in denying the motion of appellant under Section 52-b of the Federal Rules of Civil Procedure to amend the findings.

16. That the court erred in denying the motion of appellant under Section 59-e of the Federal Rules of Civil Procedure to amend the judgment.

This notice is given pursuant to the provisions of Subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure and of Subdivision (6) of Rule 19 of the Rules of the above entitled Court.

Dated: This 14th day of June, 1949.

STANTON & STANTON,
By /s/ LOUIS B. STANTON,
Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 17, 1949.

No. 12261

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A.,
a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLANT.

STANTON & STANTON,
740 South Broadway, Los Angeles 14,

Attorneys for Appellant.

MESIROV & LEONARDS,
1618-20 Packard Building,
Philadelphia, Pa.,
Of Counsel.

FILED

NOV 21 1940

PAUL P. O'BRIEN

TOPICAL INDEX

	PAGE
Jurisdiction	2
Statement of the case.....	3
Findings and conclusions of judgment.....	8
Questions presented	10
Specification of errors	11
Argument	15

I.

Repudiation, renunciation or anticipatory breach made by appellee entitled appellant to recover its damages therefor in an amount equivalent to the total difference between the contract price and the market prices prevailing at each of the dates when appellee ought to have accepted and paid for the glucose.....	15
A. The general rule for determination of damages for sales	16
B. The rule is clear that an anticipatory breach or repudiation of an executory sales contract gives an option exclusive to the promisee to treat the contract as binding during the full time for performance, or to take immediate action either by rescission or suit.....	21
C. Repudiation was ineffective prior to September 20 1946. The June notice of intent was wholly unilateral until that date and was refuted by the negotiation instituted by appellee for contract cancellation and liability liquidation	26
1. Examination of evidence on notice of repudiation and of negotiations.....	28
2. The June repudiation notices were unaccepted until September, hence wholly ineffective.....	33
3. The June repudiation notices were ineffective in themselves	36

D. The pendency of negotiations for settlement suspended the period for the determination of damages to the date of termination of the negotiations.....	42
E. The renouncing party may not require the promisee to sue for breach of contract before the performance dates	48
F. The last day of the month is the delivery date in all contracts requiring delivery during a month.....	53

II.

Market values throughout the contract delivery period warrant relief as prayed	55
A. Only one market	55
B. The market price during the contract delivery dates....	57

III.

The contract rate of exchange upon which the parties agreed must govern the court in its computation of damages for breach of the contract.....	61
A. The contract rate of exchange governs the damages.....	62
B. The rate of exchange prevailing at the date of breach in the absence of a contractual rate governs the damages	64

IV.

Procedural errors	70
Errors in computation	70
Errors in ruling on motions to amend findings and judgment	71

V.

Conclusion	71
------------------	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Adler v. Kiber, 5 Tex. Civ. App. 415, 27 S. W. 23.....	26
Alderson v. Houston, 154 Cal. 1, 96 Pac. 884.....	23, 50
Anderson v. La Rinconado C. Club, 4 Cal. App. 197, 40 P. 2d 571	52
Atkinson v. District Bond, 5 Cal. App. 2d 738, 43 P. 2d 867.....	34
Atchison v. Hulse, 107 Cal. App. 640, 290 Pac. 916.....	34
Bank of California v. International, 40 F. 2d 78.....	66
Barth & Co. v. Canadian Government, 63 F. 2d 241.....	63
Bell v. Bank of California, 153 Cal. 234, 94 Pac. 889.....	34
Bu-Vi-Bar Pet. Corp. v. Kraw, 40 F. 2d 488, 69 A. L. R. 1295	41, 50
California Canning Peach Growers v. Harris, 91 Cal. App. 654..	38
Cook v. Nordstrand, 83 Cal. App. 2d 188, 188 P. 2d 282.....	35
Curtis v. T. G. & T. Co., 3 Cal. 2d 612, 40 P. 2d 562.....	47, 52
Dante v. Miniggio, 298 Fed. 845, 33 A. L. R. 1278.....	66
DiFernando v. S. Smith & Co., 89 L. J. K. B. N. S. 1039, 11 A. L. R. 358.....	64
Dutra v. Cabral, 80 Cal. App. 2d 114, 181 P. 2d 26.....	52
Forbes v. Murray, Fed. Cas. No. 4928.....	63
Frankish v. Federal M. Co., 30 Cal. App. 2d 700, 87 P. 2d 90	47, 53
Gross v. Mendel, 225 N. Y. 633, 121 N. E. 871.....	65
Grunwald v. Freese, 4 Cal. Unrep. 182, 34 Pac. 73.....	66
Hanson v. Slaven, 98 Cal. 377, 33 Pac. 266.....	34
Hicks v. Guinness, 269 U. S. 71, 70 L. Ed. 168.....	68
Hogue-K v. Pettit, 48 Cal. App. 495, 192 Pac. 113.....	34
J. P. Gentry v. Margolius, 110 Tenn. 669.....	26
Kantor v. Aristo Hosiery, 248 N. Y. 630, 162 N. E. 553.....	65
Kunlig v. Dexter & Carpenter, 32 F. 2d 195.....	24

	PAGE
Marine Ins. v. McLanahan, 290 Fed. 685.....	63
Muehlstein & Co. v. Hickman, 26 F. 2d 40.....	25
Muehlstrom v. Hickman, 20 F. 2d 40, 58 A. L. R. 1294.....	50
Oakland v. P. G. & E. Co., 47 Cal. App. 2d 444, 118 P. 2d 328..	52
Ohio Elec. Cur. Co. v. Le Sage, 182 Cal. 450.....	40
Parker v. Hoppe, 257 N. Y. 333, 178 N. E. 550, 80 A. L. R. 1359	65
Pennsylvania R. Co. v. Cameron, 124 Atl. 638, 38 A. L. R. 1281	62
Rauer's Law & Collection Co. v. Harrell, 32 Cal. App. 45, 162 Pac. 125.....	34
Reniger v. Hassel, 216 Cal. 209.....	53
Rice v. Schmid, 18 Cal. 2d 382, 115 P. 2d 498.....	17
Rice v. Schmid, 25 Cal. 2d 259, 153 P. 2d 313.....	18, 22, 48
Richard v. American Union Bank, 241 N. Y. 17, 149 N. E. 338, 43 A. L. R. 512.....	64
Robinson v. Raquet, 1 Cal. App. 2d 533, 36 P. 2d 821.....	24
Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 78, 44 L. Ed. 953.....	24
Ross v. Tabor, 1 Cal. App. 2d 533, 36 P. 2d 821.....	24
Sokoloff v. National City Bank, 250 N. Y. 690, 164 N. E. 745	65
Staltenberg v. Haverton, 1 Cal. 2d 264.....	40
Stillwell v. RCA Mfg. Co., 62 Cal. App. 2d 347, 144 P. 2d 638..	52
Twoky v. Realty S. Co., 4 Cal. 2d 374.....	40
United States v. Burton Coal Company, 273 U. S. 337, 47 S. Ct. 351, 71 L. Ed. 670.....	19, 22
United States Trading Corp. v. Newmark G. Co., 56 Cal. App. 176, 205 Pac. 29.....	46, 50
Ventura R. Co. v. Roseberg Oil Co., 82 Cal. App. 648, 256 Pac. 434	46, 51
Vitagraph Inc. v. Liberty T. Co., 197 Cal. 694, 242 Pac. 709....	52

Voght Bros. Mfg. Co. v. Sloss Sheffield Steel & I. Co., 297 Fed. 54	26
Walker v. Harbur Bur. Blk. Co., 181 Cal. 773.....	40, 47
Walker v. Price, 163 Cal. 617, 126 Pac. 482.....	24
Weld v. Victory Mfg. Co., 205 Fed. 770.....	26
West Arrow, The, 10 Fed. Supp. 385.....	65
Wilton v. Clarke, 27 Cal. 2d 1, 80 P. 2d 141.....	34
Woodward v. Glenwood L. Co., 171 Cal. 513, 153 Pac. 951....	47, 53
Wright v. Beeson, 159 Cal. 113.....	40

STATUTES

Civil Code, Sec. 98.....	23
Civil Code, Sec. 1624a.....	38
Civil Code, Sec. 1698.....	38
Civil Code, Sec. 1724.....	38
Civil Code, Sec. 1780.....	37
Civil Code, Sec. 1783.....	37
Civil Code, Sec. 1783, Subd. 3.....	44
Civil Code, Sec. 1784.....	37
Civil Code, Sec. 1784, Subd. 3.....	16
Federal Rules of Civil Procedure, Rule 52-b.....	2, 14
Federal Rules of Civil Procedure, Rule 59-e.....	2, 14
Judicial Code, Sec. 24 (28 U. S. C., Sec. 1332) (formerly Ju- dicial Code, Sec. 41; 1-c and 1391(c)).....	2
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 1294.....	2
United States Code, Title 28, Sec. 1332.....	2

TEXTBOOKS

PAGE

Benjamin on Sales, Sec. 568.....	34
55 Corpus Juris, Sec. 329, p. 339.....	53
25 Corpus Juris Secundum, Sec. 114, p. 791.....	52
17 Corpus Juris Secundum, Sec. 374, p. 859.....	40
17 Corpus Juris Secundum, Sec. 472, p. 973.....	23, 49
25 Corpus Juris Secundum, Sec. 194, p. 909.....	69
Restatement of Law of Contracts, Sec. 223.....	40
Restatement of Law of Contracts, Sec. 320	40, 49
Restatement of Law of Contracts, Sec. 322.....	48
Restatement of Law of Contracts, Sec. 338.....	23
Williston on Contracts, Sec. 1334.....	50
Williston on Contracts, Sec. 1335.....	50
Williston on Contracts, Sec. 1336.....	50
Williston on Contracts, Sec. 1337.....	50

No. 12261

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A.,
a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLANT.

Compania Engraw Commercial E Industrial, S. A. (hereinafter referred to as appellant), sued Schenley Distillers Corporation (hereinafter referred to as appellee), by reason of its repudiation of its contract with appellant to purchase 1135 tons of glucose at Buenos Aires, Argentina. Under the terms of the contract counted upon, the appellee agreed to pay appellant 1,560,625 Argentine pesos, the equivalent of which in American dollars at the contract rate of exchange is \$464,702.06. Both parties have appealed. Judgment for the appellant declared the validity and terms of sale and awarded judgment for damages for the breach. The trial court determined adversely to appellant, that the damages were to be deter-

mined as of the date of the notice of intention to repudiate, rather than at the respective dates when the glucose ought to have been accepted, or in the alternative, at the date of final disposition of the glucose. It also chose as the rate of exchange that prevailing at the date of judgment, and did not accept the contract rate agreed upon by the parties. The damages, in case the contract rate of exchange at dates of delivery were taken, amount to \$211,224.08, or in case the alternative date of actual disposition, \$238,225.97.

Jurisdiction.

Jurisdiction was conferred upon the District Court by Section 24 of the Judicial Code, as amended, 28 U. S. C. 1332 (formerly Section 41; 1-c and 1391(c) of the Judicial Code). The action is one to recover more than \$3,000.00. It was brought by a corporate citizen of a foreign state against a corporate citizen of Delaware, domesticated in California, and actually doing business within the Southern District of California, all as set forth in the amended complaint [R. 19]. This Court has jurisdiction to review the judgment below under Sections 1332 and 1291 and 1294 U. S. C. The judgment was entered February 23, 1949 [R. 70]. Motions under Rule 52-b and 59-e to amend the findings and judgment were filed in due time and were denied March 14, 1949 [R. 78]. The appeal notice was filed April 11, 1949 [R. 79], together with the statutory bond.

Statement of the Case.

There is but slight conflict between the parties on the facts. It is in the application of the law of sales and of contract to the settled facts that differences arise between the appellant and appellee and between each and the Court.

The contract of purchase comprised four letters [R. 112, 115, 121 and 123; Exs. 2 to 5] and were subscribed by the agents, later described, of each of the parties. They were mailed as of the date they bore date, except as to that dated May 23rd, to which the vital addition was made on May 24th after a telephone call between Messrs. Donnelly, Baglin and Whipple [R. 119, 681].

A full written memorandum of the contract subscribed by the agent of appellee, which was particularly noted by the Court, was on May 24, 1946, sent to the Vice President in charge of Production of appellee [R. 684, 692, 374; Ex. 58].

The terms of the contract, amplified by the oral testimony and set forth in the written exhibits and virtually summarized in Finding 4 [R. 63] were that:

“That it is true that between the 19th day of May, 1946, and the 25th day of May, 1946, a contract was made and entered into between the plaintiff and defendant under and by the terms whereof plaintiff agreed to sell and deliver to defendant, and defendant agreed to purchase and receive from plaintiff 1135 tons of glucose made from pure crystal corn syrup, testing between 43 and 45 degrees Baumé f.o.b. ship in the Harbor of Buenos Aires, Argentina, at the price of 1.375 Argentine pesos per kilo, packed in wooden cooperage and containing 600 pounds each, on a shipping schedule of 50 tons to be shipped in June, 60 tons to be shipped in July, 200 tons to

be shipped in August, 150 tons to be shipped in September, 275 tons to be shipped in October, 200 tons to be shipped in November, and 200 tons to be shipped in December, all in the year 1946; that under the terms of said contract, plaintiff undertook to furnish with each shipment a certificate of analysis showing the glucose in each shipment to be of prescribed specifications, and likewise undertook to furnish a certificate of inspection of cooperage; that under and by the terms of said contract, the total purchase price of said glucose was 1,560,625 pesos; that said defendant agreed to make payment for said total purchase price by a letter of credit bearing expiration date of October, 1946, at the exchange rate of 335.82 Argentine pesos to 100 American Dollars."

Appellant corporation is located in Buenos Aires, Argentina [R. 102; Ex. 1], incorporated under the laws of that country and engaged in the business of exporting from and importing to that country for its customers in the United States; its president at all times herein was G. Fred Berger, who resided in Buenos Aires.

The agent of appellant in the present transaction, duly authorized to act, was Harold A. Whipple [R. 105, 196, 199; Ex. 18; R. 202; Ex. 19], an import-export broker with offices in Los Angeles, California. He carried on the negotiations with appellee both by telephone and letter.

Appellee corporation is domesticated in California, although organized under Delaware laws, and transacts business in the Southern District of California, where it has an office, according to the admission of the answer [R. 45].

The agent of appellee in the present transaction, duly authorized to act, was J. B. Donnelly [R. 126, 693; Ex. 6], who apparently had no official title. He and his assistant, R. H. Baglin, carried on the negotiations with appellant. Their offices were in San Francisco.

The negotiations for the purchase of glucose were started by Mr. Donnelly about May 14, 1946 [R. 106], in a telephone call to Mr. Whipple. Other telephone calls, with consequent cables from Mr. Whipple to his principal in Buenos Aires, resulted in what might be termed a letter of intent or offer on May 20, 1946, from appellee [R. 112; Ex. 2]. They culminated in the acceptance dated May 23, 1946 [R. 123; Ex. 5].

A notice of intention to repudiate the contract was given by telephone on June 6, 1946 [R. 143], by an unidentified person to Mr. Whipple; then on June 7, 1946, by wire [R. 144, 398; Ex. 13], which merely conveyed the statement that appellee would not contract. The individual who made the telephone conversation and signed the wire, a Mr. Jas. E. Woolsey, was not known to Mr. Whipple, nor was his authority in any way determined. No information came from either Messrs. Donnelly or Baglin.

Active negotiations for the determination of liquidation of liability of appellee were started by a cablegram from C. W. Metcalf to appellant on June 11, 1946 [R. 281, 283; Ex. 29], and likewise a telephone call from Mr. Metcalf to Mr. Whipple on said date [R. 332; Ex. 48]. Mr. Metcalf was a consultant in the employ of appellee [R. 281] and was directed by Mr. Carl J. Kiefer [R. 842; Ex. R 3] to "continue to handle this matter." Mr. Kiefer was the vice president of appellee in charge of production

[R. 785; Ex. R 2], and Mr. E. R. Dichter, who subsequently conducted the Argentine negotiations, was an employee of appellant who acted under the express direction of Mr. Metcalf [R. 327; Ex. 42]. Mr. Dichter, under instructions, went to Buenos Aires to investigate the facts and he and Messrs. Berger and Metcalf made a tentative agreement that appellee would furnish a twenty per cent letter of credit, and an orderly liquidation over the contract period, under the control of Messrs. Berger, Dichter and a Dr. Goytia, would be made [R. 288, 293, 296; Exs. 31, 32]. It was not until September 4, 1946 [R. 314], that appellant was advised by the secretary of the appellee, Mr. Heymsfeld of New York, that appellee "had no further intention of going through with any arrangement." On September 20, 1946, appellee finally, by letter from its secretary, confirmed its intention to repudiate the contract [R. 318; Ex. 37].

An open public market established the market values during the whole contract period to the date of disposition. The evidence as to market values was produced by deposition from four dealers and two brokers in Buenos Aires, all of whom were active in the glucose market [R. 458, 461, 490, et seq.; Exs. 60A to G]. Speculative buyers had built the price from 78 centavos per kilogram in January, 1946, to 1.20 pesos in June [R. 557; Ex. 60G]. The price firmed at 1.20 in June [R. 495; Ex. 60A], but with news of the repudiation becoming public, there was a sharp and complete break [R. 495, 516, 527, 536; Exs. 60A-C-D-E], and the price fell to 60 centavos per kilogram during the latter part of June and continued at that rate during the whole contract delivery period [R. 516; Ex. 60C]. It then fell to 52 or 53 centavos [R. 505, 516, 537; Exs. 60B-C-E] per kilogram during

April of 1947, the date of final disposition. The market price in Buenos Aires was based upon glucose in bulk or returnable containers, and was a price irrespective of foreign or domestic consumption [R. 495, 506, 537; Exs. 60A-B-E]. Transference of the glucose to f.o.b. ship status was constant throughout the period at 15 centavos per kilogram, which paid the expense of cooperage into wooden kegs, transportation to ship's side, and the placement on ship, including clearance of export taxes and incidentals [R. 537; Ex. 60E].

Canvass of the Buenos Aires and world market after repudiation brought no purchasers. Dealers on the Buenos Aires market testified [R. 495, 505, 526-537; Exs. 60A-B-D-E] that the very news of the repudiation of the present contract, comprising as it did an immense quantity of glucose, disorganized the market, and sales on that market were thereby rendered fruitless [R. 537; Ex. 60E]. Appellant, by cable and letter and at great expense, sought buyers throughout Europe and Asia, but without avail [R. 334]. Europe was flooded by UNNRA shipments [R. 527; Ex. 60D], and competition from the United States was offering at prices below the Argentine market [R. 556; Ex. 60G]. Significant it is that the suppliers of appellant, although they had their remedy by legal vendue, did not throw their holdings upon the market.

Appellant entered into contracts with five glucose suppliers to furnish deliveries in accordance with the deliveries under the contract with appellee [R. 228, 243; Exs. 21A to G]. These contracts were all made between May 22 and May 24, 1946, and were all at a price of 1.20 f.a.s. The difference between the market price and the f.a.s. price was a constant of 10 centavos [R. 551;

Ex. 60G], just as the difference between the f.o.b. cost and the f.a.s. cost was 5 centavos [R. 551, 537; Ex. 9E].

Litigation with the suppliers ensued after the breach, involving necessarily court expense and time lost. Eventually a compromise was reached under which the suppliers terminated their claims against appellee [R. 341, 342; Ex. 50], on April 9, 1947, and on that date final disposition of the glucose contracted with appellee was made. Until that date, no disposition could be made of the glucose by sale or otherwise. Therefore, appellant claims the right of recovery, taking the April, 1947, market value.

Findings and Conclusions of Judgment.

The District Court has filed its written opinion [R. 58], upon which the findings were based.

It found the facts as in favor of appellant as to:

- (a) The contract.
- (b) The period of negotiations.
- (c) The public market or current price during the whole contract period.
- (d) The clear and certain proof of the market price.
- (e) The performance of all conditions by appellant.
- (f) The contract was one in foreign commerce.
- (g) No prohibition of the export of glucose from Argentina was extant.
- (h) The repudiation by appellee of its contract.

It determined adversely to appellant the facts as to:

- (a) The two market prices, one for domestic consumption and one for export.
- (b) These market prices had no constant relation to each other.
- (c) The market price in September.
- (d) The lack of inducement to defer any disposition during the liquidation negotiations.

It omitted to find the essential facts as to:

- (a) Market prices at the seven contract delivery dates.
- (b) The market price on the date of final disposition.

It made clerical errors as to:

- (a) Various computations.

It erred in holding:

- (a) That the date of the first notice of intention to repudiate the contract was the date for determination of damage.
- (b) That the notice of intention to repudiate was in fact an anticipatory breach.
- (c) That the rate of exchange computing the damages was \$.206, which was the rate on February 2, 1949, rather than the contract rate of \$.33582.
- (d) In refusing to hold either that the seven delivery dates specified in the contract or the date of final disposition of the glucose were the dates for the determination of the damages.

Questions Presented.

First: Where the buyer of goods without cause denies the existence of contractual relations and refuses to accept and pay therefor, there being at all times an available market for the goods in question, is the measure of damage for the breach of contract the difference between the contract price and the market or current price at the time of the first notice of intent to repudiate, or is the seller entitled to measure its damages by the difference between the contract price and the market or current price at the respective times when the goods ought to have been accepted in accordance with the contractual terms?

Second: Where a buyer of goods, without cause, has given to the seller notice of its intention to repudiate the contract of purchase and negotiations thereafter ensue between the parties concerning an orderly liquidation of the goods and settlement of the contractual liabilities, do such negotiations, even though unconsummated, operate to defer until the conclusion thereof the date for the assessment of damages for breach of the contractual obligation to accept and pay for those goods which by the contractual terms became deliverable during the course of the negotiations?

Third: When the parties by contract have agreed upon a certain rate of exchange at which foreign moneys shall be transmuted into domestic moneys and *vice versa*, is this binding upon the parties and the Court?

Fourth: Where the parties to a contract have not agreed upon the rate of exchange at which foreign moneys shall be transmuted into domestic moneys and suit is brought for breach of contract to pay in foreign moneys,

is the judgment to be entered for the dollar value of the foreign moneys as of the contractual date at which payment should have been made or as of the date of the judgment?

These are the questions raised by appellant's amended complaint as amended, and the answers to which are involved in this appeal.

Specification of Errors.

The District Court erred in the following particulars:

1. In holding that the damages for repudiation on anticipatory breach of the contract for delivery of goods at the seven different delivery dates specified in the contract be fixed as of the date of notice of intent to repudiate rather than at the dates when the merchandise ought to have been accepted. This holding is implicit in Findings 6 and 8 [R. 65 and 67], Conclusion 3 [R. 68] and Decision Paragraph 2 [R. 59].

2. In holding that a mere notice of intent to repudiate, without any action thereon by the promisee, actually constitutes an anticipatory breach of contract. This holding is implicit in Finding 6 [R. 65], Conclusion 3 [R. 68], Decision 2 [R. 59] and the complete absence of any evidence of acceptance or action thereon by the plaintiff.

3. In holding that negotiations between the parties for liquidation of the liability of appellee as they were conducted, did not induce appellant to defer action for disposal of the glucose. This holding in Finding 7 [R. 65], Decision 2 [R. 59] is contrary to the evidence and is wholly unsupported thereby.

4. In holding that the damages for the repudiation on anticipatory breach of the contract for the delivery of

goods at seven different delivery dates, be fixed at the date of the notice of intent to repudiate or make anticipatory breach rather than at the date of final disposition, although the first three delivery dates were extended by reason of negotiations between the parties for settlement of liability and liquidation. This holding is implicit in Findings 4, 6, 7 and 8 [R. 63, 65, 66], Conclusion 3 [R. 69], Decisions 2 and 3 [R. 58 and 60] and is contrary to the sole evidence produced and is unsupported thereby.

5. In holding that although the contract of the parties specifically provides for a definite exchange rate at which foreign currency will be transmuted into domestic money, the rate of exchange prevailing at the date of judgment be used in determining the amount of damage. This holding is implicit in Finding 9 [R. 67], Decision preamble [R. 58]. It is contrary to finding of the contractual term in Finding 4 [R. 64] and is cited as Error in Law.

6. In holding that the rate of exchange specified by the terms of the contract bears no relation to the amount of damage which appellant was entitled to receive. This relates to Finding 6 [R. 64]. The Court found in said finding the contract rate of exchange was 335.82 Argentine pesos to 100 American dollars, then contrary thereto found that appellant was not entitled to receive payment in accordance with the contract. Contrary further to this finding, it arbitrarily fixed the rate as of February 2, 1949, in Finding 9 [R. 67]. The findings are conflicting in this respect and contrary to the evidence of the contract, and are also cited as error of law.

7. In failing to find that there was but one market and one market price in Buenos Aires for the sale and

purchase of glucose, and that the cost of transference from that market to f.o.b. ship in Buenos Aires was a constant of 15 centavos per kilogram, in accordance with the uncontradicted evidence. Finding 8 [R. 66] is in itself contradictory in that it finds in the first part thereof that at all times there was "an actual open and public market and established market price." Thereafter it proceeds to find that there was a market price for glucose for domestic consumption and a market price for glucose for export, and that these prices have no fixed or constant relationship. In so far as the finding is contradictory, it is cited as Error of Law. The finding implies that there were two markets and two market prices. Therein it is contrary to the evidence and is wholly unsupported thereby. The finding that there was a difference between the market price for domestic consumption and that for export is contrary to the evidence and is wholly unsupported thereby. The implied finding that there was no continuing fixed or constant relationship to the domestic market price for glucose and the export cost pertaining thereto is contrary to the evidence and is wholly unsupported thereby. The finding that the established market price for glucose during June, 1946, for export was 1.35 Argentine pesos per kilogram is contrary to and wholly unsupported by the evidence as to any sum above 1.20 Argentine pesos per kilogram. In this respect, it may be stated as true that the evidence established a market price of 1.20 Argentine pesos per kilogram and that the cost of transference f.o.b. ship in Buenos Aires Harbor was 15 Argentine centavos per kilogram.

8. In its holding against the uncontradicted evidence that the market value of the glucose in September, 1946,

was in excess of 60 centavos per kilogram. Finding 8 [R. 66] in its holding as to the September, 1946, export price, is contrary to the sole evidence of market prices. Said evidence showed a market price in September, 1946, not above 60 centavos Argentine per kilogram and that the cost of transference from the market f.o.b. steamship Buenos Aires Harbor was 15 centavos Argentine per kilogram.

9. In failing to find the market price for glucose in the Buenos Aires market at the respective seven delivery dates specified in the contract and at the date of the ultimate disposition thereof. The essential issue was tendered in the Amended Complaint, Paragraph X of the First Cause, and Paragraph III of the Second Cause [R. 22 and 24] of the market values during the contract delivery period and until final disposition. The evidence is clear as to these market prices. It was error not to find thereon.

10. In permitting clerical errors in the findings of judgment. Finding 8 contains an obvious clerical error; $1,560,625 - 1,532,215 = 28,410$ not 28,375. This carried forward in Finding 9 which requires the amount of \$5,852.44 instead of \$5,845.25 and into Finding 10 which requires the figure of \$1,111.71 instead of \$1,103.35, with consequent error in the judgment which should be \$6,964.17 instead of \$6,946.60.

11. In failing to grant the motion of appellant to amend the findings and judgment under the provision of Federal Rules of Civil Procedure 52-b and 59-e, in accordance with the uncontradicted evidence. These motions embraced the same specifications as are hereinabove stated. The action of the Court in denying each of the two motions is cited as Error.

ARGUMENT.

I.

Repudiation, Renunciation or Anticipatory Breach
Made by Appellee Entitled Appellant to Recover
Its Damages Therefor in an Amount Equivalent
to the Total Difference Between the Contract
Price and the Market Prices Prevailing at Each
of the Dates When Appellee Ought to Have
Accepted and Paid for the Glucose.

The problem of the case at bar is to apply the general rule governing sales contracts to an indivisible contract with several delivery dates on which notice of intent to repudiate was given prior to the time for deliveries thereunder. Incident to the solution is the determination of the actual date of repudiation and the effect, if any, of unconsummated negotiations instituted by the vendee for the liquidation of its liability. Under the facts of this particular case, inasmuch as the negotiations and the determination of the date of repudiation involve much the same evidence, in the interests of brevity, they will be treated in connection with each other. Upon the solution of these problems, it will be clear that appellant is entitled under the law and the evidence, to the full damages for which it prays.

The amended complaint allages [R. 21] that on June 7, 1946, appellant was informed that it should "proceed no further with said contract or deliveries thereunder," and in Paragraph VIII of the pleading [R. 22] it is averred that on September 18, 1946, appellee "definitely refused to accept any deliveries." These averments were placed in issue by the answer of appellee [R. 47]. So the problems, as above stated, were issuable under the pleadings and ample evidence for their determination is in the record.

**A. The General Rule for Determination of Damages
for Sales.**

Under the Uniform Negotiable Instruments Law, as adopted in California, the particular section governing this case is found in Section 1784, subdivision 3 of the California Civil Code, reading:

“Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.”

There was an available market in Buenos Aires at which glucose could be purchased at all times during the contract period [R. 494-505-526-536], and there were established market and current prices therefor; in fact, Finding 10 [R. 67] so states. The contract provided for seven definite successive dates for the acceptance by appellee of definite quantities of glucose. Appellant contracted with its suppliers for periodic deliveries of glucose so as to enable it to fill each of the requirements for the seven specific delivery dates [R. 228-230-243; Exs. 21A to G]. The quoted Code section specifically provides that the damages be fixed “at the time or times fixed for acceptance.” It is only when no time is fixed by the contract for acceptance that damages may be determined “at the time of refusal to accept.” Thus, the only provision of the Code applicable to the case at bar is that fixing the damage at the times fixed by the contract for acceptance.

Subsequent to the adoption of the Uniform Sales Act in California, the California Supreme Court clearly and definitely determined the rule in two outstanding decisions in one case governing the determination of damages involving only one contractual delivery date. A vendor plaintiff contracted with a vendee defendant to sell flour. The vendor contracted with third parties to furnish the flour in order to supply the contract thus made. The vendee, after several deliveries had been made, refused to accept final delivery. Anticipatory breach was not involved. The action was for damages for this failure to accept. The trial court had allowed the recovery of the difference between the contract price to the vendee and the contract price to the vendor made by his suppliers. The market had fallen. Objection was likewise raised that the vendor, in claiming the difference between the contract price and the market price at the time of specified delivery, would make a profit. In the first of these cases, the Court held, *Rice v. Schmid*, 18 Cal. 2d 382, 115 P. 2d 498:

“He was obligated to deliver the flour in any event. His duty was not conditioned upon the performance of any contract he should chance to make with the miller. Therefore, his damages should not be affected by his loss upon any such contract. Since he was free to wait and procure flour at the market price when ordered by the buyer, he is entitled to recover as damages the profits which he would have made in that event, the difference between market price and the contract price * * *. The possibility that the plaintiff may make a large profit is a result of the decline in the market price and is not a sufficient reason for allowing the defendants to escape the obligations of their contract. (For a full description

of the principles here involved, see *U. S. v. Burton Coal Co.*, 273 U. S. 337; 47 Sup. Ct. 351; 71 L. ed. 670; 27 Colum. Rev. 877.)”

This case again came before the California Supreme Court, as the trial court refused to deal with any flour other than that actually purchased and on hand. In the second appeal, the Supreme Court held that it was wholly immaterial as to the flour on hand at any time. In fact, the vendor need not have any on hand prior to the date when he must deliver. But this fact did not furnish any basis for finding that the plaintiff's recovery be affected, and stated (*Rice v. Schmid*, 25 Cal. 2d 259-62, 153 P. 2d 313):

“It was held on a prior appeal that under the terms of the contract, defendant's obligation to accept the flour continued until the termination of the contract, and that the damages should be the difference between the contract price and the market price on the date of the final termination of the contract.”

One feature, at first blush, seems to differentiate the *Rice v. Schmid* case from the case at bar. This difference, on analysis, is however, only apparent rather than real. In the case at bar there were contractual “times when the goods ought to have been accepted.” In the *Rice v. Schmid* case there was only one time for acceptance and that was on or before the date fixed in accordance with the contractual terms by the seller. The *Rice v. Schmid* case contract provided for deliveries on buyer's instructions and that in case of failure to receive such the seller could give notice to terminate. The seller gave the notice

and fixed December 2, 1938, as the date for termination. The buyer stood obdurate. The Supreme Court, contrary to the trial court, held the termination date so fixed was the date for measurement of damages between the contract and market price. That date was in fact the "time when the goods ought to have been accepted"; it was, if no time had theretofore been fixed, "the time of the refusal to accept" and was "the final termination of the contract."

The California Court referred to and relied upon the rule announced by the United States Supreme Court in the Burton case. In this case, the Burton Coal Company had a contract with the Government for the delivery of coal over a period of time for use at army posts in the Chicago district. In order to furnish this coal, the Burton Coal Company had made various contracts for the purchase of coal from mining companies under which deliveries were to be made at different periods. It had no coal of its own, except as it acquired coal under these purchase contracts. After some of the coal had been delivered, the Government refused to accept the balance. The Court of Claims gave judgment for the *difference between the contract price and the market price at the times and places specified for delivery*. The Government appealed and claimed that the rule of damage should be the difference between the contract price to the Burton Coal Company and the contract price to the Government. The Court held in *U. S. v. Burton Coal Company*, 273 U. S. 337, 47 Sup. Ct. 351, 71 L. Ed. 670:

"Appellee was bound to deliver the quantity of coal covered by the contract. Failure of the sources referred to in the contract would not excuse it. In contemplation of law, *it could have obtained the coal*

at market prices prevailing at the times when deliveries were required under the contract. The contract was not for production or mining, but for sale and delivery of coal. Appellant and appellee were the only parties to it. There was no contract between appellant and any of the mining companies. Their default would not make them liable to appellee, or would relieve appellee from the obligation to deliver the coal to appellant. Appellant's liability is not measured by appellee's loss or gains, if any, under its agreements with the mining companies. Appellee is not entitled to have the full contract price of coal not delivered, but is chargeable only with its market price. The difference between that value and the contract price is the amount of damage deemed by the law directly and naturally to result in the ordinary course of events under appellant's breach of contract. The cost of appellee of securing the coal and the amount of its profits are immaterial. Garfield & P. Coal Co. v. New York N H & H R Co., 248 Mass. 502-506; 143 N. E. 312; Kadish v. Young, 108 Ill. 170-178-186; 43 An. Rep. 548; C. F. Jamal v. Moolla Dawdood Sons Co. (1916) 1 A. C. 175 P. C. The judgment leaves appellant in as good position as it if had accepted and paid for the coal in accordance with the contract." (Italics added.)

The rule, therefore, is clear that the damages must be the difference between the contract price and the market price at the times and places specified for delivery. It is further clear that it matters not, by reason of the fact that there was a decline of the market, that a judgment for damages between that which the vendor contracted to purchase and that which it contracted to sell, may be recovered.

B. The Rule Is Clear That an Anticipatory Breach or Repudiation of an Executory Sales Contract Gives an Option Exclusive to the Promisee to Treat the Contract as Binding During the Full Time for Performance, or to Take Immediate Action Either by Rescission or Suit.

Consideration of the situation of appellant on receipt of the notice of intention to repudiate is first required. Seven contracts with five different suppliers were made under which the respective suppliers were bound to deliver, and appellant was bound to receive, the 1135 tons of glucose contracted by appellee at seven successive monthly delivery dates, extending from June to December, 1946. The market was known to be highly speculative, and the new Peron Government was just assuming control.

News of the notice from Mr. Woolsey was received by night letter from Mr. Whipple of date June 6th [R. 145; Ex. 14; R. 145]. This could not have been received until the 7th, as the telephone conversation with Mr. Woolsey was about 2 o'clock of the afternoon of the 6th [R. 398; Ex. 52]. June 7, 1946, was a Friday. On June 8th Mr. Berger sent his cable directly to appellee at its Cincinnati office [R. 279-280; Ex. 28], but the cable actually was not delivered until Monday, the 10th, as the exhibit shows. On June 11th, Mr. Metcalf commenced negotiations by his cable to appellant [R. 283; Ex. 29], and by telephone to Mr. Whipple [R. 330; Ex. 47], all contemplating liquidation of liability.

Appellant did not have on hand in June, nor was it required to have on hand the 1135 tons of glucose. There-

fore, it was physically impossible for it to throw that quantity upon the market for sale in June. This quantity of glucose represented approximately one-seventh of the whole actual glucose export from Argentina [R. 494-504-536; Exs. 60A-B-E]. In case this glucose had been thrown upon the market on that date, unquestionably it would have broken the market so that sales could not have been made except at practically give-away prices [R. 495-506-516-526-537; Exs. 60, 60A-B-C-D-E]. Under the rule of *Rice v. Schmid* and *Burton v. United States, supra*, the seller need only deliver and possess the ability to deliver when under the contract delivery was required.

The circumstances of this transaction therefore left no alternative but to stand upon the contract, treat it as binding during its full term, and take action for the determination of damages at its final termination. Expense incident to separate actions at the end of each month rendered such method prohibitive. Appellee was not present in Argentina. Businessmen desire to avoid the expense and delay of litigation. It was the duty and it was desirable for appellant to liquidate its damage when opportunity so to do this was offered by appellee, in such manner as to preserve the rights of appellee. Therefore, the determination to stand upon the contract, arrange for liquidation, if possible, under the offers of appellee, endeavor to dispose of the glucose pending final action, and in the event of the failure of either of those methods, to bring suit upon the termination of the contract, was justified both under the facts and the law.

The rule which gives to the innocent promises his exclusive election to take action immediately upon the breach or wait the termination of the full contract, is clear, rea-

sonable and factually workable. It is in true consonance with such elementary legal principles as set forth in

California Civil Code, Section 98:

“A contract in writing may be altered by a contract in writing or by an executed agreement and not otherwise.”

The definite rule throughout the United States specifically followed in the California and the Federal jurisdictions is plainly stated in

17 *Corpus Juris Secundum*, Section 472, page 973:

“On repudiation of an executory contract, the promisee may (1) rescind the contract, or (2) treat the contract as binding until the time for performance, or (3) sue immediately for the anticipatory breach.”

Restatement of Contracts, Section 338:

“The rule for determining the damages recoverable for an anticipatory breach are the same as in the case of a breach at the time fixed for performance.

COMMENTS: The fact that an anticipatory repudiation is a breach of contract does not cause the repudiated promise to be treated as if it were a promise to render performance at the date of the repudiation. Repudiation does not accelerate the time fixed for performance, nor does it change the damages to be awarded as the equivalent of a promised performance.”

This is the definite rule in California:

Alderson v. Houston, 154 Cal. 1-10, 96 Pac. 884.

“(1) He may treat the contract as rescinded and sue at once on a *quantum meruit* for the service actu-

ally rendered by him prior to the revocation of notice thereof, or (2) he may treat the contract of employment as continuing, though broken by the principal, and sue on the breach for damages. In the latter case, he may either sue for damages at once upon the breach of the contract or wait until the expiration of the time of service fixed by the contract and then sue for damages.”

Walker v. Price, 163 Cal. 617-620, 126 Pac. 482;

Ross v. Tabor, 1 Cal. App. 2d 533-43, 36 P. 2d 821;

Robinson v. Raquet, 1 Cal. App. 2d 533-43, 36 P. 2d 821.

This is the rule in the Federal courts. It is to be noted that in the *Burton Coal Company* case above cited, the Court of Claims judgment was for the difference between the contract price and the market price at the times and places specified for delivery. This rule was upheld in the Supreme Court decision. The ruling was required by a former decision of the Supreme Court, which gave very thorough consideration to the facts and is a leading case on the point:

Roehm v. Horst, 178 U. S. 1-11, 20 Sup. Ct. 78, 44 L. Ed. 953-7.

The particular point here involved was emphasized in a succeeding case similar on the facts to that of the case at bar.

Kunlig, J., v. Dexter & Carpenter, 32 F. 2d 195-8:

“The measure of damages is the difference between the market and the contract price at the time when and the place where delivery was due (*U. S. v. Bur-*

ton Coal Co., 273 U. S. 337.) Dexter & Carpenter introduced evidence to establish the market value of the coal at the tidewater ports during September and October, 1920, the freight then prevailing for shipment of coal to the designated Swedish port and cost of insurance on such shipments. The total of these three items deducted from the contract price would give the seller's damage. There was also testimony that the supply of coal on ships and of insurance was sufficient to have enabled Dexter & Carpenter to have shipped during the period in question 60,000 tons of coal of the contract quality. In respect of the measure of damages, there was no error."

Thereby the seller is entitled to bring his action on the date of each delivery date, but he is not required to cumber the record with these seven different actions. He is fully entitled to await the full contract term and then, as appellant did in this case, file its action for all of the seven breaches. The courts throughout the country dealing with this type of case have found the rule clear that the damages are to be determined as of the last date for shipment of each of the several shipments.

Muehlstein & Co. v. Hickman, 26 F. 2d 40:

"The seller is not compelled to avail himself of an anticipatory breach, but may wait until the full period of performance has expired. The rule is thus clearly stated by Judge, now Chief Justice Taft, in *Bevard & Tannin Co. v. J. F. Mosser Co.*, C. C. A. 4th, 28 Fed. 729.

"The provision for delivery by monthly instalments of four tanks before September 26th had been clearly waived by the parties, and the deliveries of the tanks not delivered had been postponed by their acquies-

cence. Defendant has no right to insist that plaintiff's damage should be measured by the market prices in the preceding months, when, with consent of the plaintiff, it delayed deliveries. These principles are truly established by the authorities.' "

Weld v. Victory Mfg. Co. (1913 D. C.), 205 Fed. 770;

Adler v. Kiber, 5 Tex. Civ. App. 415, 27 S. W. 23;

Voght Bros. Mfg. Co. v. Sloss Sheffield Steel & I. Co. (1942 C. C. A. 6), 297 Fed. 54;

J. P. Gentry v. Margolius, 110 Tenn. 669.

C. Repudiation Was Ineffective Prior to September 20, 1946. The June Notice of Intent Was Wholly Unilateral Until That Date and Was Refuted by the Negotiation Instituted by Appellee for Contract Cancellation and Liability Liquidation.

The basic error of the trial court was in its holding that repudiation took place with a consequent termination of contractual rights at a date prior to September 20, 1946. This error appears in the preamble and Paragraphs 2 and 3 of the Decision [R. 58] and in Findings 6 and 8 [R. 65 and 66]. Therefore, the action of the Court in fixing June 6, 1946, as the critical date for determination of damages is wholly untenable. Two settled legal principles, either of which would be sufficient, join in the case at bar to require deferment of the period for fixation of damages until subsequent to September 20, 1946. First, there was no repudiation until the September date, and second, active negotiations instituted by appellee for contract termination or liquidation of its liability were in progress until that date. Against each of these two principles, against the decisions of the California courts supporting

them, and against the facts as uniformly disclosed by the documents, testimony and evidence, the District Court ruled that the damages for the breach of the whole contract be advanced from the respective delivery dates to and determined as of date June 6, 1946. On its opinion the District Court grounded its findings and judgment. The controlling portion of Paragraph 2 reads:

“When, as here, there is a direct repudiation and denial of the existence of any binding agreement, the other party to the agreement is not justified in continuing to make commitments that might change its decision. This is especially true when, as here, it is admitted that whatever discussions took place after this repudiation, *did not aim at restoring the contract*, but at liquidating the liability of the defendant for payment of money to the plaintiff.” (Court’s emphasis.)

This statement contains two fallacious premises and a complete non sequitur. First, the evidence is positive that the appellant made no commitments that changed its position. Second, the negotiations were clearly for the purpose of liquidating the contract liability and preserving all of the rights of appellant. Third, even if the two fallacious premises had been true, it does not follow through, either legally or factually, that the determination of damage would relate back to the original notice of intent to repudiate.

The repudiation notice of September 20, 1946, was the only effective repudiation. This fact and the further absence of any commitments on the part of appellant subsequent to May 23, 1946, are considered under this heading. The point that the dates for the determination of damages commence subsequent to September 20, 1946, is considered

in the immediately succeeding division of this brief. For the sake of brevity, as the cited evidence bears on each of the three points, close examination of the oral and documentary evidence is here made. It will be found that from this evidence there was prior to September 20, 1946, no completed contractual relations which in any respect altered the position of the parties.

1. EXAMINATION OF EVIDENCE ON NOTICE OF REPUDIATION AND OF NEGOTIATIONS.

The repudiation notice mentioned in Finding 6 [R. 65] and the Decision [R. 59] was a telephone message from a Mr. Woolsey to Mr. Whipple [R. 143-443; Ex. 59A] on June 6, 1946. Mr. Woolsey also sent a wire on June 7th [R. 144; Ex. 13]. These acts were pursuant to a telephone call from Mr. Heymsfeld to Mr. Woolsey on June 5th [R. 568, R. 824; Exs. R and R 3]. It is to be especially noted that neither Mr. Heymsfeld nor Mr. Woolsey, although nominally Secretary or Assistant Secretary of appellee, were in any respect executive officers [R. 429-30; Ex. 59A]. Then on June 6th at noon, two hours before he had telephoned to Mr. Whipple [R. 398; Ex. 52], Mr. Woolsey wired Manny Blanc [R. 402; Ex. 53] to take no action on the samples of glucose being forwarded to Mr. Whipple. It will be noted that Mr. Whipple, on June 5th, in accordance with the talks with Mr. Baglin, had sent a sample of glucose to Manny Blanc [R. 139; Ex. 11]. The mainspring of this action on the part of appellee is found in the memorandum of instructions of Mr. Metcalf, the consultant of appellee, of date June 24th [R. 324; Ex. 40], wherein he stated that in May appellee thought it would require a very large quantity of glucose, and negotiations for the purchase of 1135

tons ensued, but in June it developed that appellee did not need this material and asked for cancellation. Suffice it to say that the duplicity of the appellee is manifested in this respect as it is throughout the negotiations.

The negotiations concerning the liquidation of the contract liability of appellee were active and continuous for two months. They are evidenced by writings signed by the respective parties through duly authorized agents. During June, appellee's plan was cancellation of the contract and payment of damage; in July, it turned to orderly liquidation over the contract period. They commenced with the two cables sent by appellant to appellee [R. 272, 274-279; Exs. 27 and 28], the first on June 5th and the second on June 8th. The first wire caused Mr. Carl J. Kiefer, the vice president in charge of production of appellee, to direct Mr. Metcalf to "handle this matter and advise what action is to be taken" [R. 842; Ex. R 3]. The second cable was likewise referred to Mr. Metcalf, and he quotes therefrom in a memorandum of a telephone conversation which he held with the agent of appellant, Mr. Whipple of Los Angeles, on June 11th [R. 332; Ex. 47]. In this talk, he "asked Mr. Whipple to call Engraw on the telephone at our expense to determine what the loss would be in liquidation of both the 50 tons ready for shipment, *as well as the balance of the contract.* * * * I told Mr. Whipple * * * that it was not our intention to cause either him or his principals any out-of-pocket expense."

On the next day, Wednesday, June 12th, Mr. Metcalf, emphasizing the telephone talk with Mr. Whipple, cabled appellant [R. 283; Ex. 29] and requested direct advice as to the "extent of your uncancellable commitments." In answer, appellant cabled Mr. Whipple [R. 235; Ex. 30]

the commitments and damages for liquidation. In mid-June, these were relayed to Mr. Metcalf in several telephone conversations with Messrs. Whipple & Stanton, counsel for appellant [R. 635; Ex. S]. Appellee had internal inter-office communication. About June 24th, determination was made to send Mr. Dichter, a trusted agent, to ascertain the facts. In instruction to Mr. Dichter [R. 325; Ex. 40] it was stated:

“Engraw appears willing to cancel, but is asking 2¢ per pound to cover loss.”

Mr. Dichter, on June 30th, arrived at Buenos Aires [R. 856; Ex. R 3]. Apparently, he immediately telephoned to Mr. Metcalf [R. 330; Ex. 46]. Something must have occurred in this telephone talk upon which Mr. Metcalf desired consultation with the officials of appellee. Mr. Metcalf, it is to be observed, was acting, at all times, upon instructions of his superiors. After the talk with Mr. Dichter, he reported to Mr. Heymsfeld, on Wednesday, the 3rd of July, and stated that he would discuss the glucose situation with him on Monday, which was the 8th of July [R. 332; Ex. 39]. Between arrival and July 4th, Mr. Dichter made a thorough investigation of market conditions and of appellant's commitments [R. 291]. On July 4th, he called upon the president of appellant [R. 287] and stated that he had been sent by appellee, had authenticated the market situation and the status of the commitments made by appellant [R. 287]. After this careful examination on the ground, Mr. Dichter then suggested that a program be devised so that the *glucose commitments be either liquidated or cancelled*. The two men then [R. 291] “made visits to several of the suppliers and particularly to the large one S.I.F.A.R., in order to ascer-

tain just exactly what arrangements could be made, either in regard to cancellation, if cancellation was to be arranged, or liquidation, and after we had had these interviews, then we compiled this cablegram of July 8th and sent it to Schenley Distillers." There resulted a joint cable to Mr. Metcalf on July 8th [R. 288; Ex. 31]. This joint cable is of special importance for our purposes here. This wire states that cancellation of the contracts will cost approximately \$45,000.00, but that in case appellee will open a letter of credit and *provide for an orderly liquidation by sale of the glucose over the whole contract period*, under the control of Messrs. Dichter and Berger, the loss can be materially reduced. However, he further states that the commission due to Mr. Whipple must be considered outside of either of these proposals. A telephone conversation between Messrs. Dichter, Berger and Metcalf followed the cable. Therein, Mr. Metcalf

"stated that insofar as the program outlined in our letter of July 8th was concerned, that it seemed quite satisfactory to him and authorized us to make contact with Dr. Goytia.

Then I told Mr. Metcalf that we would check on the matter of letter of credit requirement and that we would then proceed to Dr. Goyia's office to complete." [R. 294.]

Mr. Metcalf's version of this telephone conversation is found in the memorandum thereof which he made [R. 332; Ex. 48]. In accordance with Mr. Metcalf's request, Mr. Berger cabled him on July 12th [R. 296; Ex. 32] that the necessary letter of credit would be twenty per cent of the purchase contract [R. 296; Ex. 32]. Dr. Goytia estimated the dollar value of this letter of credit

at \$85,000.00 [R. 610; Ex. R 1]. Messrs. Berger and Dichter visited the glucose suppliers of appellant and confirmed that arrangements would be made with them for the cancellation of their contracts with appellant [R. 291]. They "agreed that if liquidation was to be arranged they would take the 20 per cent letter of credit" [R. 295]. Pursuant to directions of Mr. Metcalf, Messrs. Dichter and Berger consulted with Dr. Goytia, and he exchanged cables with his correspondent counsel in New York. There are, in the record, only the cables of date July 18th and 22nd from Dr. Goytia, produced from the files of appellee [R. 610-612; Ex. R 1]. These cables outlined the proposal for the liquidation procedure and definitely show that no commitment was, at any time, actually reached on the proposed plan [R. 297]. They show that the appellant continuously insisted upon its full compensation. No determination was made by appellee. Mr. Dichter cabled Mr. Metcalf on July 26th that the misunderstanding would be costly, and stated that he would telephone Monday [R. 321; Ex. 41]. The 26th was a Thursday. Monday was the 29th of July, 1946. On August 2nd, Mr. Dichter returned to the United States [R. 312]. When appellant cabled him for his decision [R. 312; Ex. 34] on August 8th, he replied on August 11th [R. 313; Ex. 35] that the whole matter was in the hands of the legal department of appellee. No further communication coming from appellee, Mr. Berger went to New York on September 1st [R. 314]. He had a meeting with Mr. Heymsfeld, the counsel and secretary of appellee, on September 4th. Then for the first time, he was informed that appellee "had no further intention of going through with any arrangement or any discussion we had with Mr. Dichter during his visit, and insofar as the contract was concerned, nothing was to be done about it" [R. 314]. There were further fruitless appointments, unkept by

appellee, and conferences which resulted only in written notice from appellant to appellee that appellant would sell the glucose at the best price obtainable and look to appellee for payment of its damages. Then, in reply to the letter of appellant of date September 18, 1946, came the letter from appellee dated September 20th, which finally repudiated the contract [R. 311 and 318; Exs. 36 and 37].

2. THE JUNE REPUDIATION NOTICES WERE UNACCEPTED UNTIL SEPTEMBER, HENCE WHOLLY INEFFECTIVE.

Advice of the Woolsey notices of June 6th and 7th was received by appellant at Buenos Aires on June 7th [R. 145; Ex. 14]. June 8th it cabled appellee [R. 279; Ex. 28], opening the way for the negotiations which followed. Therein both parties contemplated the continued contract existence. The termination was not until the September letters of the 18th and 20th [R. 316-318; Exs. 36 and 37]. Thereupon appellant, for the first time, acted upon the repudiation and refusal to perform.

Basic in the rule governing the parties to a contract is that which provides that contract terms may not be altered without the consent of both. Hence, a refusal to perform or repudiation by one gives to the other the option of various procedures. In the case at bar, appellant consistently maintained the contract existence and willingness to perform thereunder until its September election to resell. In order to constitute an effective repudiation, there must be not only an unequivocal refusal to perform by one, but an acceptance by the other. Until that acceptance of the refusal, there can be no alteration of the contract terms. This general rule has had the unfaltering

acceptance of the California Courts quoting from Benjamin on Sales, Section 568.

“It must be a distinct and unequivocal absolute refusal to perform a promise and must be treated and acted upon as such by the party to whom the promise was made, for if he afterwards continued to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end.”

This rule has expressly been cited and followed in the following cases:

Hanson v. Slaven, 98 Cal. 377-82, 33 Pac. 266;

Bell v. Bank of California, 153 Cal. 234-42, 94 Pac. 889;

Rauer's Law & Collection Co. v. Harrell, 32 Cal. App. 45-67, 162 Pac. 125;

Hogue-K v. Pettit, 48 Cal. App. 495-8; 192 Pac. 113;

Wilton v. Clarke, 27 Cal. 2d 1-4, 80 P. 2d 141.

In the *Rauer* case, *supra*, and the following cases, the Court emphasized the necessity that in order to have a notice of repudiation of any value or effect, it must be acted upon by the party to whom it was given. In the case at bar, neither party acted upon the notice. The cases in point are as follows:

Atchison v. Hulse, 107 Cal. App. 640-45, 290 Pac. 916;

Atkinson v. District Bond, 5 Cal. App. 2d 738-43, 43 P. 2d 867.

In this case last cited, on March 23rd the defendant notified plaintiff in writing and declared that the contract of March 16th was made void and rescinded on account of erroneous information furnished concerning the job.

The case turned upon the fact of repudiation. The Court held that this letter of March 23rd was a mere declaration of defendant not to be bound and of itself did not amount to a breach so as to effect a renunciation of the contract. It further held that no breach of the contract was made until April 18th, when the plaintiff acted upon this breach. The Court stated the rule as follows:

“The real operation of a declaration of intention not to be bound appears to give the promisee the right of electing either to treat the declaration as *brutum fulmen* and, holding fast to the contract, to wait until the time when performance has arrived, or to act upon the declaration and treat it as a final assertion by the promissor that he is no longer bound by the contract, and as a wrongful renunciation of the contractual relation into which he has entered.”

Cook v. Nordstrand, 83 Cal. App. 2d 188-194, 188 P. 2d 282.

Here, the defendant gave an oral statement, on November 2nd, that she would not be bound by the agreement to sell the property. It appeared that the plaintiffs did not rely upon this oral statement as a repudiation or regard it as an anticipatory breach, and the plaintiffs were held to the performance of the contract.

It was not until the September interview between Messrs. Berger and Heymsfeld that refuge was taken by appellee in its June 6th notice. Even then, the door was left open for further negotiations, and it was closed only on September 18th, when appellant gave its written notice that it would sell the glucose for the account of appellee. Manifestly, the acceptance of the anticipatory breach did not, under the California law, take place until September 20, 1946. It was not until after September 20th, it will be noted, that appellant commenced to scour the world

for other purchasers for glucose. The thorough examination made of the evidence discloses no trace of any commitments made by appellant subsequent to June 6th, nor is any change in the position of appellant, at any time, to be found, nor is there any evidence of termination of the contract.

The process of perception or of reason, by which the trial court arrived at its decision determining that June 6, 1946, is the date as to which damages should be computed, has never been perceptible to appellant. Clearly, it is directly contrary to the settler's law of California.

3. THE JUNE REPUDIATION NOTICES WERE INEFFECTIVE IN THEMSELVES.

The judgment and decision rest upon the June 6th telephone notice from Mr. Woolsey. Finding 6 holds that, on that date, appellee repudiated. On at least two grounds, the June notices were insufficient: (A) Mr. Woolsey admittedly had no authority to bind appellee. (B) The notices were insufficient to alter the terms of the written contract.

A. *The lack of authority of Mr. Woolsey to bind appellee is manifest.* Mr. Whipple's negotiation had all been with Messrs. Donnelly and Baglin, with whom he was in constant contact up to and on June 5th [R. 137]; on June 6th, he sent a sample of the glucose [R. 139; Ex. 11]. About 2:00 P. M., June 6th, came an unknown voice over the telephone, stating it belonged to Mr. Woolsey of the Law Department; that appellee would not fulfill their contract [R. 143, 398; Ex. 52]; that Mr. Donnelly had no authority to contract, and that the voice would transmit Mr. Whipple's request for a written statement to the proper person. June 7th came the brief wire,

likewise signed by Mr. Woolsey, but not by a responsible officer.

Election was with appellant in case of a repudiation notice to take any of the remedies provided in California Civil Code, Sections 1783 and 1784, with eventual resale under Section 1780 of the same Code. But action upon the election depended upon proving that the person giving the notice was, indeed, an agent of appellee, authorized by it to give the notice. In case of action by appellant involving disposition of the glucose and a rise in the glucose market, heavy damages would ensue unless the Woolsey authority was proven by appellant.

"I told him that I would transmit his request to the proper person" was the answer of Mr. Woolsey himself to the request for confirmation "by a responsible officer of the Schenley Corporation." This, in itself, indicated that the speaker was not "the proper person" or a "responsible officer," so the June 7th wire was no higher in authority than the message of the 6th. Mr. Woolsey testified [R. 429; Ex. 59 A] that although Assistant Secretary, he was not an executive officer of appellee; that he received his directions from Mr. Heymsfeld, Secretary of appellee, but who was not an executive officer, and the wire of June 7th was not sent upon the direction of any executive officer. As his whole conduct was solely that of counsel, he claimed the right of privilege against disclosure. Mr. Heymsfeld claimed the same privilege and stated he merely transmitted information to Mr. Woolsey [R. 784; Ex. R 2]. Appellant sought to require these witnesses to state the facts relative to these instructions, if any, and answer the interrogations placed to them. Appellee vigorously contested, on the ground that each witness was acting solely as counsel and not as executive. This position was upheld in the Court order of March 29, 1948. Ap-

pellee cannot now be heard to claim that Mr. Woolsey had any authority to bind appellee by the June notice.

Apropos of the case at bar is the case now to be cited, wherein one of the directors of the purchaser who originally negotiated the purchase contract informed the vendor for the vendee "We cannot accept Elberta peaches." He testified he was not authorized by the vendee's Board to refuse acceptance of any contracted peaches. Judgment went for the vendor, but was reversed on appeal. The case is that of *California Canning Peach Growers v. Harris*, 91 Cal. App. 654-60:

"But in the case at bar there is no evidence that Denison, with the knowledge and acquiescence of its directors or general manager or by their direction, ever had exercised authority of the kind called in question in this case. In fact, the testimony in the case is directly to the contrary. Furthermore, there is no evidence in the record indicating that the business in question claimed to have been transacted by Denison could be deemed to be incidental to or connected 'with power to transact ordinary business.' Furthermore, there is no evidence in the record showing any ratification on the part of the corporation of the claimed conduct of the assumed agent in refusing in advance to accept defendant's peaches."

B. *The notices were ineffective to alter the terms of the written contract.* The contract is for the purchase of goods of a value in excess of \$500.00 and of such nature that it must be written, signed by a duly authorized agent (Cal. Civil Code, Secs. 1624a, 1724). It can be altered only by a written contract or executive oral agreement (Cal. Civil Code, Sec. 1698). Appellee insists upon this in its answer as a special defense [R. 50]. But the June 6th notice, upon which the Findings and Judgment rest

was only oral. The June 6th notice is not mentioned in the pleadings which note that of June 7th.

The contract was established by appellant. Thereupon the burden of proof shifted to appellee to establish an alteration or termination of that contract. It relied on the June 7th notice [R. 47] for that purpose. Essential to such burden was the proof of the authority of Mr. Woolsey to sign the wire of June 7th and thereby bind appellee to its consequences. It has not sustained that burden.

The wire in itself can be construed only as an offer to alter the terms of the contract. The lack of authority of Mr. Woolsey has been noted. The effective words are "We are not entering into any agreement." The wire was never accepted by appellant and was thereby ineffective. It was not acted upon during the negotiations later noted. In fact, Mr. Metcalf, in his cable of June 12th [R. 322; Ex. 47] and talk with Mr. Whipple on June 11th, wherein he requested advice as to the extent of the uncancellable commitments, coupled with the negotiations in Buenos Aires, all affirmed the contract, recognized its existence and the rights of appellant thereunder. The acts of both parties for a full period of two months was directly contrary to any idea of lack of contract. Other particular sections of this brief, dealing with this question, demonstrate that the June notices were ineffective for any purpose. They were mere trial balloons. The Finding and decision that the contract terminated and the rights of the parties were to be determined as of June 6th has no support in the evidence nor in the law applicable thereto.

Essentially the obligation of appellee was to establish, by written evidence or executed oral agreement, an alteration of the contract. Such alteration with corporate parties may be only by duly authorized agents. Here, there was no such alteration.

Walker v. Harbur Bur. Blk. Co., 181 Cal. 773-9;

Ohio Elec. Cur. Co. v. Le Sage, 182 Cal. 450-56;

Wright v. Beeson, 159 Cal. 113-7;

Staltenberg v. Haverton, 1 Cal. 2d 264-6;

Twoky v. Realty S. Co., 4 Cal. 2d 374-83;

Restatement of Contracts, Sec. 223;

17 *Corpus Juris Secundum*, Sec. 374, p. 859.

C. The sale "commitments" of appellant were prior to June 6th for the commodity purchases. Scan the record from beginning to end; not a trace evidencing any commitment subsequent to June 6th will be found. Yet the trial court stated in its decision that appellant was "not justified in continuing to make commitments that might change its position." All purchase contracts were completed by May 24th. It is true that, at the request of appellee, tentative commitments aimed at confirming the contract and liquidating the liability of appellee were made. These contemplated sale of the subject of the contract, payment of the supplier and of appellant's profits. But after holding in abeyance a month and a half, appellee finally rejected the planned commitments. Such negotiations are favored in the eyes of the law.

Restatement of the Law of Contracts, Sec. 320:

"Effective of Urging Performance in Spite of Repudiation.

Manifestation by the injured party of a purpose to allow or to require performance by the promisor in

spite of repudiation by him, does not nullify its effect as a breach, or prevent it from excusing performance of conditions and from discharging the duty to render a performance.”

Comment:

“a. Although the effect of repudiation may be nullified as stated in Sec. 319, it operates until so nullified not only as a breach but as a continuing excuse of conditions under the rule stated in Sec. 308, and as a continuing justification of the promisee’s failure to perform a return under the rule stated in Sec. 280, even though the promisee has indicated a willingness to forgive the repudiation.”

Bu-Vi-Bar Pet. Corp. v. Kraw, 40 F. 2d 488, 69 A. L. R. 1295-1302:

“A continued willingness upon the part of the injured party to receive performance is an indication that if the repudiation will withdraw his repudiation, but not otherwise, the contract may proceed. It is not an ‘irrevocable election not to treat the repudiation as a breach.’ ”

The error into which the trial court fell is thus apparent. No commitments were made. The sole construction which can be placed upon the negotiation were that appellee admitted its contract liability, sought to minimize its damages, and dealt with a view to carrying out its contract, insofar as appellant was concerned. Solely with that end in mind, did appellant deal. The original notice of Mr. Woolsey was a mere trial balloon and, until September, considered by both parties as wholly ineffective.

D. The Pendency of Negotiations for Settlement Suspended the Period for the Determination of Damages to the Date of Termination of the Negotiations.

Attack is here directed to that portion of Finding 7 which indicates that the learned trial court fell into grievous error as to both the factual and legal character of the negotiation proceedings which took place between June 6 and September 20, 1946. Without reiterating the procedures, significant facts only of the testimony are here stated. The negotiations and their termination settle five points:

- a. They commenced with view of settlement of liability under the contract.
- b. They proceed in July to a contemplated completion of deliveries under the contract.
- c. Basis throughout was the liability of appellee under the contract.
- d. Both parties contemplated deferment of delivery dates under the contract.
- e. Notice of intent to resell the commodities was given pursuant to remedy therefor under the contract.

Appellant, upon receipt of news of the Woolsey messages, cabled appellee, on Saturday, June 8th [R. 279; Ex. 28] and therein stated:

“If loss occurs must protect our interests stop if glucose desired, please cable.”

Tuesday, June 11th, Mr. Metcalf, far from claiming, as Mr. Woolsey erroneously did, that there was no contract and no authority in Mr. Donnelly, impliedly ratified the contract in his cable to appellant, wherein he requested advice of “uncancellable commitments” [R. 283; Ex. 29].

He telephoned Mr. Whipple, on June 11th [R. 331; Ex. 47] and

“asked Mr. Whipple to call Engraw on the telephone at our expense *to determine what the loss would be in liquidation* of both the fifty tons ready for shipment as well as the balance of the contract . . . I told Mr. Whipple that we regretted the confusion regarding this matter and that *it was not our intention to cause either him or his principals any out-of-pocket expense.*”

The suppliers of appellant were obdurate; heavy cancellation costs were reported to appellee to ascertain the facts. Mr. Dichter was sent to Buenos Aires the 1st of July. His independent investigation unquestionably convinced him that the best method to minimize the damages which appellee must pay would be to take over the contracts which appellant had made with its suppliers and dispose of the glucose from Buenos Aires, thus avoiding the freight charge to the United States. Provided appellant's profits and its agents' commissions were cleared, this was clearly, from the correspondence, agreeable to appellant. With those ends in view, Messrs. Dichter and Berger joined in the night letter cable of July 8th [R. 288; Ex. 31] and therein stated:

“Opening of letter of credit at once eliminate penalty to extent of \$30,000.00 and would provide necessary time *for orderly liquidation over contract period which is for balance 1946* also sale over such extended period should further reduce probable loss, if any, to nominal amount therefore we suggest we act as your *agents to liquidate contracts* using our judgment as to manner of liquidation.”

In a telephone talk with Mr. Metcalf later, he "stated that insofar as the program outlined in our letter of July 8th was concerned, that it seemed quite satisfactory to him." The wire of the 12th [R. 296; Ex. 32] informed Mr. Metcalf that a twenty per cent letter of credit margin would be acceptable for the liquidation program. This amounted, according to Dr. Goytia, the attorney for appellee to \$85,000.00 according to his cable of July 18th [R. 610; Ex. R 1].

Mr. Dichter returned to the United States at the end of July and there the negotiations awaited the final decision of the officialdom of appellee. Meanwhile, the market was dropping so that when Mr. Berger went to New York in September, the market had determined their decision and revised appellee's views of the Woolsey communication, which they had, for three months, held in abeyance.

The contract liability was the basis of these negotiations. Those of June contemplated payment of all costs incident to the contract cancellation. Those of July definitely aimed at restoring the contract and liquidating the liability of appellee, not as the Decision states "through payment of money to plaintiff" but by selling on the market the glucose through the intervention of the \$85,000.00 letter of credit. The procedure of appellant was strictly in accordance with its rights under California Civil Code, Section 1783, Subdivision 3, thence the parties in the July 8th cable arranged that the glucose on delivery would be held by appellant as bailee for appellee and sold under the joint control of both. Thereby both parties agreed to defer the June, July and August deliveries to September. This is in accordance with the California rule relating thereto.

These negotiations, it will be specifically noted, at all times from June 8th to their conclusion, were on the original basis proposed by appellant of saving it harmless and preserving its profit and expenses with cancellation of its commitments to the suppliers by means of the twenty per cent letter of credit from appellee. In this respect, *the negotiations of the parties looked at all times to the fulfillment of the contract*, insofar as appellant was concerned, by reason of the fact that appellee would take over from appellant the suppliers' contracts with their comment, and pay to appellant its profits and costs.

The fact of the matter is, as clearly shown by depositions, that in case the glucose had been thrown upon the market, it would have broken the market and no prices above 20 centavos per kilo would have been realized. Appellee could thereby have no benefit. If, in fact, appellant had taken its election to sell the merchandise on the market for the best price obtainable, the damages sought here would have been far higher than those demanded under the amended complaint.

The pendency of negotiations for settlement of the contract rights after notice of anticipatory breach of an individual contract of sale having many delivery dates, necessarily contemplates an extension of time for the acceptance of the periodic deliveries. This is a matter of common sense. There could be no settlement if the vendor was to force his rights by suit at the end of each contract delivery period. The California rule is settled that in breach of contract actions wherein the contract calls for installment deliveries, the pendency of negotiations sus-

pend the dates for determination of damages until the date of final refusal. That is, in fact, the rule which the California courts have adopted and have consistently followed.

Ventura R. Co. v. Roseberg Oil Co., 82 Cal. App. 648-54, 256 Pac. 434.

This case was for the sale of oil covering periods extending to upwards of a year. One of the issues was whether the dates of delivery or the date upon which negotiations between the parties were terminated should be taken as the critical date for the determination of the market value for damage purposes. The Court held:

“Be that as it may, however, there can be no doubt but that negotiations were pending during the entire period, looking to the acceptance by the defendant of the oil. *It cannot be questioned under these circumstances that plaintiff assented by its acts and its statements to an extension of time within which defendant might accept*—and not until after January 17, 1922, did plaintiff terminate its negotiations. It does not rest with defendant to complain on this score, when it sought and was granted further time within which to supply shipping instructions.” (Italics added.)

U. S. Trading Corp. v. Newmark G. Co., 56 Cal. App. 176-191, 205 Pac. 29.

Here the parties had agreed upon a sale of grain at various dates over a period of time. An embargo interfered with actual deliveries. The parties had differences of opinion as to their rights consequent on the embargo, and indulged in extensive correspondence involving various

notices. After the lifting of the embargo, these differences of opinion and correspondence continued. It became necessary to determine liability and fix the date for assessing damages. The Court held:

“Because plaintiff at its election could treat the time when the embargo should be lifted as the time for completion of performance by defendant, *the damages should be measured as of the date when defendant, after the lifting of the embargo, refused to make further delivery*, which was November 12, 1919, the date adopted by the Court for that purpose. In measuring damages, the rule is that if before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be demanded by the buyer will govern, and not the market price on the date of such notice or anticipatory breach.” (Italics added.)

This is in harmony with the general rule of law in California that when negotiations are pending between the parties, the time for election to act is suspended until the termination of the negotiations.

Walker v. Harber BB, 181 Cal. 773, 186 Pac. 356;

Woodward v. Glenwood L. Co., 171 Cal. 513-23,
153 Pac. 951;

Frankish v. Federal M. Co., 30 Cal. App. 2d 700-
12, 87 P. 2d 90;

Curtis v. T. G. & T. Co., 3 Cal. 2d 612-21-22, 40
P. 2d 562.

E. The Renouncing Party May Not Require the Promisee to Sue for Breach of Contract Before the Performance Dates.

Contracts are made to be performed in accordance with their terms. After the meeting of the minds thereon one of the parties may not, by his own volition and to suit his own purposes, require the other party to omit to perform or change the terms. Ergo, he may not require the promisee to take action for non-performance before the times provided under the contract for the performance. From such common-sense view, the rule with respect to anticipatory breaches has been derived.

The notice of a repudiation has no other effect than to place the innocent party at his election of one of three courses of action. This view is required by Section 322 of Restatement of Contracts, which holds that the period of the statute of limitations runs, not from the date of the notice of anticipatory breach, but from the time fixed for the performance.

There can be no justification for findings holding that the damages in the case at bar be fixed as of the date of a repudiation notice, nor is there justification under the *Rice v. Schmid*, *supra*, cases for the holding that damages be determined other than at the contractual dates specified. It is to be remembered that in those cases, by the very terms of the contract, the seller was given the right to specify a contractual date for performance. The damages were fixed as of the contractual date. The District Court, in the case at bar, found in accordance with unquestioned facts in its Finding 5 [R. 66] that appellant:

“was at all times ready, willing and able to make delivery thereof on board steamship in the Harbor of Buenos Aires, Argentina, at the delivery dates

set forth and prescribed in said shipping schedules, heretofore found, of all the said glucose so to be delivered; that it is further true that said plaintiff duly performed each and all of the conditions and provisions under said contract to be performed upon its part.”

There, therefore, is no element here of a change of condition such as to render performance impossible. As above noted, there were no commitments by appellant, and there was no change in its position. The Court has so found, in Finding 5 [R. 66]. There was no abatement at any time of the demand for full performance or in lieu thereof the measure of damage which the law would award. The decision of the District Court is, in this respect, directly contrary to the rule of the text writers and of the courts which have given consideration to this subject. The decision attempted to make a new contract for the parties, accelerates the date of performance, and nullifies the whole program for performance which appellant was required to keep and maintain. This is not permissible under the rules of law applicable to the situation.

Restatement of the Law of Contracts, Section 320:

“Manifestation by the injured party of a purpose to allow or require performance by the promisor in spite of the repudiation by him, did not nullify its effect as a breach, or prevent it from excusing performance of conditions or from discharging the duty to render a return performance.”

17 Corpus Juris Secundum, Section 472, page 978:

“The renouncing party may not force the other, nor is the other bound, to sue for a breach of the contract before the date fixed for performance ar-

rives, and have the damages assessed as of the time of a renunciation. The party keeping the contract, in other words, need not mitigate the damages by treating as final the premature repudiation.”

Williston on Contracts, Sections 1334-1337;

Alderson v. Houston, 154 Cal. 1-14, 96 Pac. 884;

Muehlstrom v. Hickman, 20 F. 2d 40, 58 A. L. R. 1294-1301.

“The seller is not compelled to avail himself of an anticipatory breach, but may wait until the full period of performance has expired.”

Bu-Vi-Bar Pet. Corp. v. Krow, 40 F. 2d 488, 69 A. L. R. 1295-1302.

“A continued willingness upon the part of the injured party to receive performance is an indication that if the repudiator will withdraw his repudiation, but not otherwise, the contract may proceed. It is not an irrevocable election not to treat the repudiation as a breach. The refusal to retract amounts to a continuation of such rescission.”

U. S. Trading v. Newmark G. Co., 56 Cal. App. 176-91, 205 Pac. 29.

In this case the parties contracted for the purchase and delivery of barley over a period of time. During the period of the deliveries, the seller as of October 7, 1919, refused to perform, and claimed that damages should be determined as of that date, but the Court held that November 2, 1919, which was the date upon which the buyer could demand delivery, must be the date for determination of damage, stating:

“In measuring damages, the rule is that if before the time when the buyer may rightfully demand delivery, the seller gives notice of an intention not to deliver, the market price as of the date when the delivery may rightfully be demanded by the buyer will govern, and not the market price on the date of such notice for anticipatory breach.”

Ventura R. Co. v. Roseberg Oil Corp., 82 Cal. App. 648, 256 Pac. 434.

Plaintiff sold oil to defendant at the rate of five cars per month for a year. Ten cars were delivered, but consequent upon a fall in the market price, defendant failed to give shipping instructions. The defendant contended that damages should be fixed as of the date of the breach in failing to give instructions. Negotiations had ensued upon this breach, looking to the acceptance by the defendant of the oil, but they came to nothing. The Court held that the date of determination of the negotiations was the date of the fixation of damages, as the contractual delivery dates had all passed.

During the negotiations, appellant actively throughout the continuance thereof and in good faith, afforded every opportunity to appellee to minimize the damages resultant upon its notice of intent to repudiate. The plan was adopted after the investigation by Mr. Dichter of the market conditions. Under this plan, the glucose was to be sold during the contract period under the control of Messrs. Dichter, Goytia and Berger. This was the only feasible method to adopt, in that under the contracts with the suppliers, deliveries were to be made at different times during the contract period. In case appellant had refused to co-operate with appellee, it might well have been criti-

cized. Certainly criticism cannot be made, inasmuch as it did accede to this plan.

There was neither pleading nor proof on the part of appellee as to any lack or failure on the part of appellant in its conduct in respect to its duty to minimize the damages. Yet it is generally held to be the duty of the defendant to plead and sustain the burden of proof on this affirmative issue.

Vitagraph Inc. v. Liberty T. Co., 197 Cal. 694-9,
242 Pac. 709;

Alderson v. Mutual, 154 Cal. 1-10;

Anderson v. La Rinconado C. Club., 4 Cal. App.
197-201, 40 P. 2d 571;

Oakland v. P. G. & E. Co., 47 Cal. App. 2d 444,
118 P. 2d 328;

Dutra v. Cabral, 80 Cal. App. 2d 114-121, 181 P.
2d 26;

Stillwell v. RCA Mfg. Co., 62 Cal. App. 2d 347-52,
144 P. 2d 638;

25 *Corpus Juris Secundum*, Sec. 114, p. 791.

Even in cases of rescission in dealing with the defense of laches, the California courts have adopted the firm rule that where negotiations are in progress between parties, there is no obligation upon the wronged party to take action until the conclusion of negotiations.

Curtis v. T. G. & T. Co., 3 Cal. 2d 612-22, 40 P. 2d
562.

“Where the vendor by promises or representations to the vendee causes the vendee to postpone efforts to rescind the contract, the vendor cannot urge the failure of the vendee to rescind within the time during

which the vendor's fears of fraud have been lulled by such repudiations."

Frankish v. Fed. Mtge. Co., 30 Cal. App. 2d 700-12, 87 P. 2d 90;

Woodard v. Glenwood L. Co., 171 Cal. 513-22, 153 Pac. 951;

Reniger v. Hassel, 216 Cal. 209-11.

There is here no question but that this is an action at law and that the doctrine of laches accordingly does not apply, but no attempt has heretofore been made to claim that the act of carrying on negotiations with the repudiating purchaser would operate to affect the rights of the vendee when the vendee had studiously at all times insisted upon its contract rights to recover damages for the breach.

F. The Last Day of the Month Is the Delivery Date in All Contracts Requiring Delivery During a Month.

The deliveries for June were not required to be made until the 30th day of June, rather than on the 6th, but the market, on news of the repudiation, had broken before June 30th to about 60 centavos [R. 494, 505, 516; Ex. 60 A-B-C].

55 *Corpus Juris*, Section 329, page 339:

"So a contract for delivery in certain months permits delivery at any time during any of the months named, and a contract for delivery 'commencing April, May' does not require delivery to commence until the end of May. On the same principle, if the agreement is that delivery shall be made within a designated month, the seller ordinarily has until the last day of the month to make delivery, and a delivery by carrier at the usual place on that day is good, although the buyer did not actually receive the goods until the next day."

The delivery date to be taken under this contract, in each instance, is the last day of the month named. Thus, the June contract day would be June 30th; the August-September delivery of 200 tons would be the last day of September contemporaneous with the September delivery of 150 tons. The judgment, in this respect, is cited as violating the contract terms made by the parties.

“I am not an executive officer of Schenley Distillers Corporation and I did not send this telegram upon the direction of any executive officer.” (Woolsey deposition.) [R. 429-435.] “Opening of letter of credit will provide necessary time for orderly liquidation over the contract period which is for balance 1946.” (Dichter wire to Metcalf.) [R. 288; Ex. 31.] “Engraw appears willing to cancel. It is asking 2¢ per pound to cover loss.” (Metcalf notation.) [R. 325; Ex. 40.]

The foregoing are, indeed, isolated statements culled from the record. Respectively, in their context setting, they disprove repudiation prior to September and prove that the June notices were unauthorized. The negotiations first contemplated damages for cancellation of the contract, then liquidation, over the contract period, at appellee's sole cost. This implicitly involved extension of the delivery periods until conclusion of the negotiations. The trial court finding is thereby contrary to the sole evidence as to the term of the negotiations; contrary to the California rule governing the right of the seller to elect his remedies and to that controlling, in cases of notices of intent to repudiate. The Findings and Conclusions of Law set forth in Findings 6, 7 and 8 and Conclusions Two and Three are thereby erroneous.

II.

Market Values Throughout the Contract Delivery Period Warrant Relief as Prayed.

The District Court made two errors of fact; one, in its finding of market values, and the other, in its omission to find on market values. Omission to find the market values on the five delivery dates other than June and September were caused by its error in finding the date for the fixation of damages as June 6th; but this being true, why it went out of its way to find the September market value, is difficult to see [Finding 8, R. 66]. On the other hand, it found that [Finding 10, R. 67] market values were well established and that the proof thereof was clear, certain and uncontradicted. These findings are clearly contradictory, not only with themselves, but with the "clear, certain and uncontradicted evidence" of the market values.

A. Only One Market.

The determination that there were two markets in Buenos Aires, one for domestic sales, the other for export sales, with no fixed relationship, one to the other, was a truly egregious error. The very finding itself illuminated the error, wherein it gives that which it terms two market prices, the one for June, the other for September, and states that between the export price and the market price, in each instance, there is a difference of 15 centavos.

This is not a mere hypercritical caviling at the wording of the finding. The whole evidence in the case was conclusive that there was but one market for glucose in bulk or returnable iron containers, and that it cost, throughout the delivery period of the contract, 15 centavos per kilogram to transfer the glucose from domestic market

and place it on board ship. This was a continuing, fixed and constant charge. It involved the elements of purchasing kegs, packing the glucose in kegs, cooperage, transportation, stevedoring, and the financing of incidental cost. There was no evidence to the contrary. Answers to the 10th and 11th interrogatories [R. 462] are given by the witnesses [R. 495, 506, 516, 537; Ex. 60 A-B-C-E]. In case this finding should be allowed to stand, then there is no evidence to sustain any market price; however, the finding is directly contrary to the sole evidence in the case.

It is true that Mr. Berger, president of the appellant, on cross-examination, did testify [R. 356], that the domestic bulk market was not the same as the export market, and that there was a difference between them. He testified, however [R. 351], that he was not qualified to answer any questions as to these differences. The fact of the matter is, reviewing his testimony between the cited pages, that he was speaking of prices on the domestic market and prices for glucose delivered under f.a.s. contract. All of appellant's glucose purchases were made at prices including deliveries free at ship's side [R. 241-4; Exs. 21 to 21G]. Inasmuch as Mr. Berger made all of his purchases from brokers, he doubtless, in testifying, had in mind the f.a.s. prices paid on the contracts in evidence to the brokers rather than the prices which at the date of purchase, prevailed on the Buenos Aires market. There is no basis in the evidence that there were two markets. However, it is to be noted that Mr. Berger was not offered as an expert, did not testify as an expert, nor had he any qualifications as an expert. Undoubtedly, it was proper cross-examination, but there was no basis upon which to ground a finding against the clear evidence of fact.

The sole market value testimony produced in the deposition is thoroughly reasonable. No one inquires in an open public market as to whether the buyer is Mr. Jones of California, or Sr. Sanchez of Buenos Aires. Either one, in case he has the money to pay, is a satisfactory bidder. Essentially, this important finding has no basis in the evidence, and, in fact, is directly contrary thereto.

B. The Market Price During the Contract Delivery Dates.

The District Court failed to find upon all but two of the market prices prevailing for the several delivery dates. It also failed to find the market value at the date of the disposition of the glucose. Evidence uncontradicted was given by the seven expert witnesses on the market price at each of the delivery dates. For the convenience of the Court, this evidence is given in answer to the 9th interrogatory [R. 461] by the witnesses.

	Tr. No.	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	April
Reim	R. 494	1.15-1.25	1.15-1.26	60	60	60	60	60	60
	R. 505		55-57	55-57	55-57	55-57	55-57	55-57	55-57
es	R. 516	1.20	60	60	60	60	60	60	60
i	R. 527	1.20-1.23 f.a.s.	None	20-60	20-60	20-60	20-60	20-60	20-60
	R. 536	1.15-1.22	1.15-1.22	No operations	No operations	61-62	61	60-61	52-53
	R. 541	1.13-1.20	1.13-1.20	No operations		61-62	61	60-61	52-53

These prices were all in the domestic market for bulk glucose or returnable containers; except it is to be noted that the Polastri deposition [R. 526; Ex. 60D] gives an f.a.s. price. This price involved a charge of 10 centavos for delivery in casks and transportation to the wharf side [R. 551; Ex. 60G]. It is, of course, a case for judicial determination as to the exact price to be taken for each

month. Appellant, in calculations for its pleadings, took the price of 60 centavos in September for all deliveries due to that date. This follows under the rule above developed, that by reason of the continuance of discussions, the negotiations, the withholding of final determination of repudiation, and the September action thereon, the September 20th date should be taken rather than the June 6th date. The price of 60 centavos for deliveries subsequent to September is taken in the calculations under the first cause of action. As calculations for the second cause of action, under the theory of pricing at the date of ultimate disposal, a market price of 57 centavos has been taken. To each of these market prices must be added, in order to determine the damage, the cost of 15 centavos per kilogram between the market value and the value on board ship.

The glucose in the case at bar was purchased in May under f.a.s. contracts at the price of 1.20 pesos [R. 244; Exs. 21 A to G]. This means that the market price for the purchase in May on the Buenos Aires market was 1.10 pesos or was 10 centavos less than the contract cost to appellant; indicating a May market price of 1.10 pesos. The evidence shows, as noted in the résumé above, that the market price in June had a range of from 1.13 to 1.20. The District Court took the highest price when, in its opinion, it held the market price in June to be 1.20 pesos, and in its findings added 15 centavos thereto to make the critical figure of 1.35 pesos. Be that as it may, there is actual evidence to sustain the finding of 1.20.

There is no evidence, however, to sustain the finding that the market price in September was 1.10 pesos. The sole evidence shows that it was 55-60 centavos in September. It is true that Mr. Berger testified [R. 353-4] that

in August there was a nominal market made up of only asked quotations of from 1.23 to 1.25. The Court has probably taken this figure and deducted 15 centavos therefrom to arrive at the figure in the findings of 1.10 pesos.

It was, likewise, reported by Mr. Heymsfeld in his deposition that Mr. Berger had told him, in a consultation held on September 4th, that the market was between 1.08 and 1.10. Now, Mr. Berger left Argentina on the 24th of August [R. 314]. The interview was September 4th [R. 314]. If the same deduction of 15 centavos is to be applied to this figure, then it shows an actual market price of 93-95 centavos. But that would be for August, not September. In short, Mr. Berger clarified the situation, when testifying that the August quotations which he theretofore had given were [R. 380] asked prices from the supplier's standpoint. The suppliers' prices of the glucose at bar were f.a.s. sales and not market sales [R. 244; Exs. 21 A to G].

The depositions of the expert witnesses on market values show that, consequent upon the news of the repudiation by appellee, according to two of the witnesses, actual sales were all domestic, at a price of 60 centavos per kilo [R. 494, 505; Exs. 60 A and B], during July, August and September, although others held at a little higher price. The speculative owners of glucose naturally held to the June prices and were adverse to taking the great drop to 60 centavos; while the buyers refused to buy, except at the actual market prices which were established by glucose manufactures to consumers. It is to be kept in mind that the May market was at the height

of a speculative trend. The price from the two manufacturers remained fairly constant throughout the year 1946 at 60 centavos [R. 526; Ex. 60 D]. The market had steadily risen from 78 centavos per kilogram, in January, 1946, up to 1.05 pesos in April [R. 555; Ex. 60 G]; and during May, advanced from 1.10 to 1.20 [R. 237]. During May, it fluctuated quite rapidly. The cause of this rise and fluctuation was that glucose was in the hands of speculative middlemen [R. 556; Ex. G]. Thereby, the rise in price and fluctuation was caused; it was especially violent, in that the brokers and dealers in glucose were only about 20 in number [R. 556]. In September of 1946, competitors in the United States were "offering at prices lower than the *Argentine producers were asking*" [R. 556]. So the speculative market which had preceded was suddenly resolved to the true 60¢ values. But the knowledge of the vast program of UNRRA in Europe [R. 527; Ex. 60 D] further tended to the bursting of the speculative bubble. In fact, it was the opinion of the broker Polastri that "prices during the period of July, 1946 to May, 1947, went down to such an extent that, in order to make a sale, it was necessary to have the vendue in which only a price of about 20 centavos Argentine currency could be obtained." [R. 526; Ex. 60 D.]

Under the clear testimony in the case, the actual determination of the market value of glucose during the seven delivery dates is eminently one for the court's judgment. There is a very small and a very natural difference between the testimony of these various witnesses. They all tend, however to the reasonable middle ground taken by appellant in its calculations of 60 centavos per kilogram for each of the delivery dates and 57 centavos per kilogram for the April delivery.

III.

The Contract Rate of Exchange Upon Which the Parties Agreed Must Govern the Court in Its Computation of Damages for Breach of the Contract.

The contract specifies [R. 116 and 124; Exs. 3 and 5], *that the export rate which shall govern parties in their computations is \$100.00 to 335.82 Argentine pesos, or \$0.29778 to the peso.* This rate spelled out for the determination of the amount per pound \$0.18573 and with other details, enters into the estimated landed cost of \$0.22293 per pound. Mr. Donnelly, in his confirmatory letter to his superior, Mr. Kiefer [R. 409, Ex. 58], itemized the detail of price including this exchange rate and states as an inducement that the rate of exchange as stated was:

“A pegged rate for export, and is therefore not subject to fluctuation. This means that the only variation in price that can occur will be in the freight rate, where there may be a slight difference. However, in no case, will the price be higher than \$.2203 per pound,”

and advises that he has accepted the proposal, on this basis.

Foreign exchange, especially since 1914, has been the cause of great difficulties in commercial transactions. Certainty in the amount payable and receivable is of prime importance to a trader in foreign commerce. Only by reason of such certainty can he, with like certainty, determine his manufacturing cost and selling price. The settlement of this uncertainty of foreign exchange by contract tends to stabilization of trade. When the parties to a contract for their own purposes have, by their solemn

agreement, settled upon any particular rate of exchange at which they will deal, that rate of exchange necessarily is one of the integral agreements between the parties and must be observed as such, even as any other term going to make up the price. It matters not whether the rate of exchange adopted by the parties is an open rate, a market rate, a par rate, a rate as of any specific time, or some governmental rate. It is, above all, *the contract rate* which the parties have agreed upon and which the parties themselves intend shall govern their relations in respect to the particular contract, irrespective of any other views.

A. The Contract Rate of Exchange Governs the Damages.

It is the settled legal principle that courts will enforce the terms of a contract in accordance with the agreement of the parties. The courts do not sit to make new contracts or vary the contractual terms. In accordance therewith, the courts have enforced in their judgments the rates of exchange as agreed upon by the parties and which are a part of the contract.

Pennsylvania R. Co. v. Cameron (Pa.), 124 Atl. 638; 38 A. L. R. 1281.

A shipment of wool from Australia was delivered at a West Coast port. Thence, it traveled by rail to Philadelphia. It had stamped upon the bill of lading "Freight, if payable at destination, to be at the rate of \$4.866 exchange." Appellants tendered payment to the Railroad Company in pounds sterling and refused to pay in dollars at the specified rate of exchange for the freight charges. The Court held to the contract rate and stated:

"Where the rate is established by contract or otherwise, it is a fixed rate and controls all matters brought

within the scope of its operation. What is stamped on the bill expressly excluded current rate exchange.”

Marine Ins. v. McLanahan, 290 Fed. 685.

The marine insurance policy provided that all claims were to be settled at the rate of \$4.75 to the pound. It was held that this fixed the rate of exchange so that all losses thereunder were payable at the contract rate.

Forbes v. Murray, Fed. Cas. No. 4928.

There was in the bill of lading a provision for the payment of freight at a specified number of pounds. The Court held that recovery should be made at the equivalent thereof in American currency.

Barth & Co. v. Canadian Government, 63 F. 2d 241:

“But the contract of the parties went further and provided how the ‘equivalent’ should be calculated, namely, ‘on current rate at date of steamer’s arrival at loading Port.’ This rate was \$4.85, it fixes the number of dollars to be paid, if payment is made in dollars. It does not, however, negative the existence of an option; the contract is to pay in the alternative ‘sterling or equivalent,’ the latter to be determined at the stipulated rate. Had the parties intended to require payment in dollars only, the means were at hand; they had merely to fill in the marginal provision above quoted. Had this been done, the duty to pay in dollars at the fixed rate would have no alternative.”

B. The Rate of Exchange Prevailing at the Date of Breach in the Absence of a Contractual Rate Governs the Damages.

The great majority of the cases dealing with the rate of exchange have been upon documents which have not specified the rate between the two countries. Varying circumstances of the cases have led courts to adopt different rules in their determination as to the time at which the rate of exchange should be adopted. In such cases, where the rate is not contractual, it now appears that the weight of authority of other jurisdictions has become harmonized, in accordance with the English and New York rule.

*The rule determining that the rate of exchange is that prevailing at the date of the breach, is simple, logical and just. No better argument for the rule can be made than that given by the learned judges of the Court of King's Bench in the case of *DiFernando v. S. Smith & Co.*, 89 L. J. K. B. N. S. 1039; 11 A. L. R. 358-60:*

“The plaintiff is entitled to have his damages assessed as at the date of the breach, and the court has no jurisdiction to award damages except in English money. I think that if that rule is kept clearly before one's mind, a great deal of the difficulty which counsel for the appellants suggested disappears. The plaintiff is entitled to his damages as at the date of the breach, and it seems to me the judge must express those damages and no other damages in English money, and in order to do that, he must take the rate of exchange prevailing at the date of the breach.”

Richard v. American Union Bank, 241 N. Y. 17; 149 N. E. 338; 43 A. L. R. 512.

“The well established rule is that a breach of an executory contract is to be allocated to the place where the contract is to be performed, and in accordance with this rule the breach of contract occurred in Bucharest.”

“Another rule is that damages for such a breach are to be measured by the standards of value which prevail where the breach occurs, which in this case would be a Bucharest where lei were the national currency at a standard of value. Nothing else was decided in this, *Hoppe v. Roussio Asiatic Bank*, 235 N. Y. 37; 138 N. E. 497, where it was simply held that when a plaintiff was entitled to recover damages for breach of contract which would be primarily expressed in money of the country where the breach occurred, the rate of exchange prevailing at the date of the breach would be adopted as the one by which to convert the foreign money into our domestic money and fix the amount of the judgment in dollars.”

Parker v. Hoppe, 257 N. Y. 333, 178 N. E. 550,
80 A. L. R. 1359-1362;

Gross v. Mendel, 225 N. Y. 633, 121 N. E. 871;

Kantor v. Aristo Hosiery, 248 N. Y. 630, 162
N. E. 553;

Sokoloff v. National City Bank, 250 N. Y. 690-1-2,
164 N. E. 745-9-50.

The Federal courts in exclusively Federal law cases, such as admiralty and patents, have tended to follow the rule of assessing damages as of the date of trial or judgment. But in the diversity of citizenship cases they have held to the New York rule.

The West Arrow, 10 Fed. Supp. 385-93.

It was held that the place and time of sale and not that of stranding fixed the accrual of libelant's cause of action. And in

Bank of California v. International, 40 F. 2d 78,

it was held that the rate of exchange must be determined as of the date of the breach and not as of the date of judgment. This case was later reversed in 64 F. 2d 97, but the later opinion did not deal with the point at issue here.

Dante v. Miniggio, 298 Fed. 845, 33 A. L. R. 1278, syllabus, A. L. R.:

"In an action in this country for the contract price of merchandise purchased in France and payable in francs, the recovery must be for dollars at the rate of exchange prevailing when the debt fell due, and not when the judgment is entered."

The California Supreme Court has endorsed the English and the New York rule in apparently the only case which has come before it, that of *Grunwald v. Freese*, 4 Cal. Unrep. 182, 34 Pac. 73-76. The parties here were merchants, the plaintiffs located in Japan and the defendants in San Francisco. The action was upon a balance due upon an open and current account. For convenience, all dealings had been quoted in Mexican dollars rather than in the currency of either Japan or the United States. Demand upon the account was made August 3, 1890. At that time, the Mexican dollar was 93½ cents. Subsequently the exchange declined. The rate to be taken in

determining the judgment was important. The opinion was written by Commissioner Searls, affirmed by the Commission and the Court. It was there stated:

“Apply the principle thus enunciated to this case, and we may say had defendant made his contract when it was due, that is to say, when demand was made upon him, plaintiffs would have had \$4,999.67 Mexican dollars of the value of 93½ cents each, or their equivalent in our currency; a sum in excess of that which the court awarded them. If a man contracts to deliver wheat on a given day, and fails to do so, the measure of damages is the market price of the article on that day, and in principle it is difficult to see why the rule should not hold good when he agrees to deliver Mexican dollars or other foreign money, which, in the absence of some positive law of our own, is but a commodity. There are authorities which hold that the rate of exchange at the date of the trial is the criterion by which to determine the amount of the judgment, but in most instances the only question evidently relates to the mere expense of effecting the exchange, or in other words, the cost of transmitting the funds, for that is what it amounts to, cases in which, so far as appears, the question of depreciation or appreciation of the currency in which the debt was payable cut no figure. In *Benmers v. Clemens, supra*, (58 Pa. St. 24), cited by appellant, the recovery was had upon the basis of the value of legal tenders at the date of the presentation of the account.”

This case was cited with approval in

281 Fed. 557, 7 F. 2d 334.

The same principle was approved in a case wherein a German firm was indebted to an American firm prior to the First World War. The Alien Property Custodian Hicks took over the property of the German firm. The American firm brought action to recover on an account stated. Justice Holmes delivered the opinion of the Court.

Hicks v. Guinness, 269 U. S. 71, 70 L. Ed. 168-171:

“We are of opinion that the courts below were right in holding that the plaintiffs were entitled to recover the value in dollars that the mark had when the account was stated. When the contract was broken by a failure to pay, the American firm had a claim here, not for the debt, but at its option for damages in dollars. It no longer could be compelled to accept marks. It had a right to say to the debtors, ‘You are too late to perform what you have promised, and we want the dollars to which we have a right by the law here in force.’ *Gould v. Banks*, 8 Wend. 562-568, 24 An. Dec. 90. ‘The event has come to pass upon which your liability becomes absolute, as fixed by law.’ *Globe Ref. v. Lenda Cotton Oil Co.*, 190 U. S. 540-43, 47 L. Ed. 1171-73, 23 Sup. Ct. Rep. 754. There is no doubt that this rule prevails in actions for a tort. *Preston v. Prather*, 137 U. S. 604, 34 L. Ed. 788, 11 Ct. Rep. 162, 1 An. Neg. Cas. 559, and in actions for the failure to deliver merchandise. *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218. The principle is the same in a contract for the payment of marks. The loss for which the plaintiff is entitled to be indemnified is but the loss of what the contractee would have had if the contract had been performed. *Chicago N. & St. P. R. Co. v. McCaull-Dinșmore Co.*, 23 U. S. 97-100, 64 L. Ed. 801-3, 40

Sup. Ct. Rep. 504. It happens at the moment when the contract is broken, just as it does when a tort is committed, and the plaintiff's claim is for the amount of that loss valued in money at that time."

The rule is summed up in

25 *Corpus Juris Secundum*, Section 194, page 909:

"Where plaintiff in a tort or contract action primarily is entitled to recover a sum expressed in foreign money, in determining the amount of recovery in terms of United States money, it is admittedly proper to take the rate of exchange prevailing at the time of the commission of the tort or breach of contract, and in the case of a debt, the rate prevailing when the debt became due should be adopted."

The courts have varied in their rules between actions in tort and actions for breach of contract and as to deliveries in foreign countries or of domestic deliveries of foreign goods, and have under varying circumstances assessed the damages: (a) At the date of the breach; (b) at the date of the commencement of the contract; (c) at the par of exchange; (d) at the date of the commencement of the suit; (e) at the date of trial; (f) at the date of judgment. The truth of the matter is that American courts in the last century were not greatly concerned with these rates of exchange and have been swayed by various reasons. But as noted above, the great State of New York has definitely settled the rule that in all cases of judgment for breach of contract, the rate of exchange prevailing at the time of the breach must be taken to find the amount of the judgment to be rendered in dollars. This is in true accord with the long settled English rule. California is in agreement therewith.

IV.

Procedural Errors.

Errors in Computation.

The more serious errors which have heretofore been reviewed, upon correction will overcome the very minor errors made by the Court in its computations. These errors needs must be noted. Finding 8 [R. 67] correctly states the contractual purchase price as:

Argentine pesos	1,560,625
The finding finds the June 6th market value as	1,532,215
	<hr/>
The correct difference between these sums is	28,410
But the Court erroneously finds the difference as	28,375
	<hr/>
An error against appellant of Argen- tine pesos	35
This error, at the rate which the Court takes of \$.206, amounts to the sum of	\$7.21

The true damage judgment under the findings, therefore, should have been \$5,852.46. This would likewise alter the interest in a small amount.

Errors in Ruling on Motions to Amend Findings and Judgment.

Motions to amend the findings and judgment respectively in the particulars noted in the specification of errors were filed in due time [R. 72 to R. 77]. They came on for hearing and were denied by the Court [R. 78]. The specifications in regard to the errors of the evidence were, therefore, brought before the trial court, and every effort was therein made to correct these factual and legal errors. The date within which the appeal was required to be filed is thereby established.

V.

Conclusion.

Resolves definitely are the questions presented by application of the law of sales to the proven and uncontradicted evidence in this case. The buyer who wrongfully refuses to accept and pay, is liable to the seller for damage for the difference between the contract price at the time or times when under the terms of the contract the goods ought to have been accepted. A notice of intention to repudiate or a repudiation notice itself, as long as it is not accepted by the seller, is of no effect to alter the rule regulating the assessment of damage. Negotiations entered into between the parties to liquidate the liability of the renouncing buyer necessarily entail a deferment of the time or times when the goods ought to have been accepted to the termination date of the negotiations. The rate of exchange for foreign moneys agreed upon in the contract by the parties is controlling, and the Court may not make a new term to the contract.

The resolution of these basic questions requires the reformation of the findings and judgment. The proven facts are clear that there was only one market in Buenos Aires for glucose during the contract delivery period. The market prices therein were less than those as alleged by the appellant. The averments of the amended complaint of the appellant were fully and clearly substantiated as to the market prices so prevailing.

Therefore, appellant was and is entitled to judgment, as prayed, on its first cause of action.

Respectfully submitted,

STANTON & STANTON,

By LOUIS B. STANTON,

Attorneys for Appellant.

MESIROV & LEONARDS,

By HARRY S. MESIROV,

Of Counsel.

No. 12,261

IN THE

United States Court of Appeals
For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),

Plaintiff and Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION (a corporation),

Defendant and Appellee,

and

SCHENLEY DISTILLERS CORPORATION (a corporation),

Defendant and Appellant,

vs.

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),

Plaintiff and Appellee.

OPENING BRIEF OF APPELLANT,
SCHENLEY DISTILLERS CORPORATION.

BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,

Mills Tower, San Francisco 4, California,

Attorneys for Defendant and Appellant,
Schenley Distillers Corporation.

CLERK

Subject Index

I.	Page
Statement of the pleadings and federal jurisdiction.....	2
II.	
Statement of the case.....	3
A. Preliminary statement	3
B. The facts	5
III.	
Specification of errors	23
IV.	
Argument	24
A. No contract was created between the parties.....	24
1. Preliminary statement	24
2. The minds of the parties never met with respect to any given agreement	25
3. It was understood between the parties that a con- tract would be created, if at all, by a formal pur- chase order	42
4. There was no absolute, unequivocal acceptance of any offer	50
B. Whipple was not plaintiff's agent	55
C. Plaintiff could not have performed the alleged contract	64
V.	
Conclusion	71

Table of Authorities Cited

Cases	Pages
Dexter v. Ankiewicz, 26 Cal. App. (2d) 326, 79 P. (2d) 400	47
Ellingsworth v. Shannon, 161 Ore. 106, 88 P. (2d) 293.....	41
Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 275	38, 52
Howard v. Chow, 27 Cal. App. (2d) 755, 81 P. (2d) 994....	41
Klauber v. San Diego Street Car Co., 95 Cal. 353, 30 P. 555	65
Las Palmas etc. Distillery v. Garrett & Co., 167 Cal. 397, 139 P. 1077	52
Patterson v. Clifford F. Reid, Inc., 132 Cal. App. 454, 23 P. (2d) 35	52
Roffinella v. Roffinella, 191 Cal. 753, 218 P. 397.....	41
Sample v. Fresno Flume Co., 129 Cal. 222, 61 P. 1085.....	65
Spinney v. Downing, 108 Cal. 666, 41 P. 797.....	48
Toms v. Hellman, 115 Cal. App. 74, 1 P. (2d) 31.....	49
U. S. Trading Corp. v. Newmark Grain Co., 56 Cal. App. 176, 205 P. 29	64
Vanhoosen v. Briscoe, 85 Cal. App. 746, 259 P. 1115.....	41
Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 75 P. 785.....	65
Yore v. Bankers etc. Assn., 88 Cal. 609, 26 P. 514.....	39

Statutes

Civil Code, Section 1585	38, 52
28 U.S.C.A. 41	3
28 U.S.C.A. 1291	3

Texts	Page
9 A.L.R. 1508, 1509	65
12 Am. Jur. 545	41
6 Cal. Jur. 61	41
17 Corp. Jur., Section 378	41
17 Corp. Jur., Section 381	52
Restatement of the Law, Contracts:	
Section 58	52
Section 274	64
Section 277	64
Section 280	64
Section 281	64
Williston on Contracts (Rev. Ed.):	
Pages 207 to 209	51
Page 222	40
Pages 2346-2348, 2464-2465	64

IN THE
United States Court of Appeals
For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),

Plaintiff and Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION (a corporation),

Defendant and Appellee,

and

SCHENLEY DISTILLERS CORPORATION (a corporation),

Defendant and Appellant,

vs.

COMPANIA ENGRAW COMERCIAL E. INDUSTRIAL S. A. (a corporation),

Plaintiff and Appellee.

OPENING BRIEF OF APPELLANT,
SCHENLEY DISTILLERS CORPORATION.

This is an action for breach of contract. A judgment was rendered in favor of plaintiff and both parties have appealed.

I.

STATEMENT OF THE PLEADINGS AND FEDERAL JURISDICTION.

On January 9, 1947, plaintiff¹ filed its complaint in this action, alleging the existence and breach by defendant of a written contract wherein defendant agreed to purchase from plaintiff 1135 tons of Argentine glucose for a purchase price of \$532,440.82, and that such breach damaged plaintiff in the amount of its alleged loss of profits, namely \$34,685.72.² Defendant's motions to dismiss, and to make more definite and certain³ were both denied.⁴

On August 4, 1947, plaintiff filed an amended complaint alleging the existence and breach of the same written contract, but claimed damages in the amount of \$247,034.55.⁵ Defendant's motions to dismiss, and to make more definite and certain and to strike the amended complaint⁶ were denied.⁷

The answer to the amended complaint denied the existence of any contract, denied any liability to plaintiff, and challenged plaintiff's capacity to sue. The answer pleaded, as affirmative defenses, that the action was barred by the Statute of Frauds, and

¹Because there are cross-appeals involved, and to avoid confusion, the parties will be designated in this brief as plaintiff and defendant, respectively, rather than as appellant and appellee.

²Tr., pp. 2-9. All transcript references will be to pages of the printed record.

³Tr., pp. 9-12.

⁴Tr., pp. 17-18.

⁵Tr., pp. 18-28.

⁶Tr., pp. 29-35.

⁷Tr., p. 44.

that plaintiff was unable to perform its obligations under the contract alleged.⁸

On September 10, 1948, after a trial on the merits was had, but before judgment, plaintiff filed an "Amendment to Amended Complaint," in which it pleaded an oral contract "evidenced" by four letters, and embodied in a separate memorandum in writing, which was pleaded by attaching a copy as an exhibit.⁹ The order permitting this amendment provided that the additional allegations were to be deemed denied by defendant.¹⁰

Jurisdiction of the District Court was based upon diversity of citizenship and the fact that the amount in controversy exceeded, exclusive of interest and costs, the sum of \$3,000.00. (28 U.S.C.A. 41.)¹¹ This Honorable Court has jurisdiction of this appeal by virtue of the provisions of 28 U.S.C.A. 1291.

II.

STATEMENT OF THE CASE.

A. Preliminary statement.

This action arose out of negotiations for the purchase by defendant of glucose manufactured in Argentina. During the course of the negotiations numerous letters were exchanged between defendant and Harold A. Whipple, a Los Angeles import-export

⁸Tr., pp. 45-52.

⁹Tr., pp. 54-56.

¹⁰Tr., p. 57.

¹¹Jurisdictional facts are pleaded at Tr., p. 18 and p. 45.

broker, who plaintiff claims was acting in this transaction as its agent. Plaintiff pleaded that during these negotiations a contract was created which "was evidenced by four letters in writing * * *; that a memorandum in writing of said contract was signed by defendant," a copy of which memorandum was attached to the amendment as Exhibit "A."¹² The trial court found that a contract was created, and rendered judgment in favor of plaintiff.

On appeal, defendant contends that, as a matter of law:

(1) The evidence fails to show the existence of any contract because

(a) there was at no time an offer and acceptance of given terms, and therefore no meeting of the minds with respect to material terms of the alleged contract;

(b) a contract was to be created only by formal purchase order; and

(c) there was no unequivocal acceptance by defendant of any offer made by plaintiff.

2. The evidence shows that Mr. Whipple was not the agent of plaintiff, but was in fact acting as a principal and for his own account, and was without authority to act for or bind plaintiff.

3. The evidence shows that plaintiff could not have performed any contract made by it with defendant, and is unable, therefore, to support any action upon it.

¹²Tr., p. 55.

We will state the facts relevant to the foregoing questions.

B. The facts.

J. B. Donnelly and R. H. Baglin are the agents and employees of defendant. Harold A. Whipple is a self-employed, independent export-import broker doing business in Los Angeles, California.¹³ Fred G. Berger is president of plaintiff.¹⁴

During the fifteen days from May 20, 1946, to June 6, 1946, Whipple negotiated with defendant through Donnelly and Baglin for purchase of Argentine glucose, and letters were exchanged during such negotiations. The complaint and the amended complaint each allege that one of these letters constituted the contract, namely, a letter dated May 23, 1946, from Donnelly to Whipple.¹⁵ The amendment to the amended complaint alleged that the contract was made "between the 19th day of May, 1946, and the 25th day of May, 1946;"¹⁶ that the contract was "evidenced" by four letters; and that the letter above referred to dated May 23, 1946, constituted a "memorandum in writing of such contract."¹⁷ Many other documents and letters were introduced by plaintiff, but it was admitted that they are not relevant to the issue of whether a contract was created.¹⁸ These four letters will be set forth in their

¹³Tr., p. 105.

¹⁴Tr., p. 218.

¹⁵Tr., p. 4 and pp. 20-21.

¹⁶Tr., p. 54.

¹⁷Tr., pp. 54 and 55.

¹⁸Tr., p. 282.

proper order in the statement of facts and each will be identified as one of the four letters relied upon.

Under date of May 20, 1946, defendant through R. H. Baglin wrote Whipple the following letter,¹⁹ which is the *first* of the four letters relied upon by plaintiff, and which confirmed a telephone conversation between them:²⁰

“Dear Mr. Whipple:

This will confirm our telephone conversation of today on the subject of Argentine glucose.

We are interested in purchasing up to 1,000 tons. Shipments to commence May-1946 (if possible at this date)—50 tons; June through September—100 tons a month; October and November—275 tons a month. If your other prospective buyer exercises his option to purchase 300 tons it is understood 50 tons a month from the above will be directed to him, making a shipping schedule to us—June through September—50 tons a month; October and November—225 tons a month, December—300 tons. Further, if your prospective buyer does not take the 300 tons, we would like the opportunity to purchase this quantity in addition to the 1,000 tons.

It is understood that we will be purchasing by letter of credit direct from the Argentine shipper, cost to us not to exceed 22.3 cents a pound in wood barrels laid down, tax paid, Pacific Coast port. It is further understood the glucose is crystal-clear obtained by incomplete hydrolysis of cornstarch, 43 to 45 Baume, with a balling of 81.8 upwards.

¹⁹Tr., pp. 112-114; Plaintiff's Exhibit 2.

²⁰Tr., p. 110.

Just as soon as you receive a reply to your cable to the shipper, which we understand will be by Wednesday of this week, you will phone this office and advise us that the shipping schedule reflected above can be met.

We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit. Thank you very kindly for the consideration you have given this matter."

Upon the basis of this conversation and letter, Whipple, on May 20, 1946, cabled plaintiff:²¹

"Confirming sale 1300 tons glucose accordance offer April 24 May 9 cable earliest shipping San Francisco whose name credit can you increase earlier shipments."

(The "offers" referred to in this cable are offers made to Whipple by plaintiff, before any contact between Whipple and defendant.)²²

Upon receipt of this cable, defendant "gathered" from the cable that Whipple had sold 1300 tons of glucose, but it did not know to whom.²³

Plaintiff immediately, on May 20, 1946, replied to Whipple by cable:²⁴

"You cannot delay twelve days and expect same price market fluctuating seriously immediate answer required if interested at onetwentyeight also

²¹Tr., p. 157, Deft's. Exh. A.

²²Tr., p. 194.

²³Tr., p. 359.

²⁴Tr., p. 208; Pltf's. Exh. 20.

need answer ourlet ninth recontract for nineteen-forty-seven.”

However, on May 21, 1946, Engraw cabled Whipple:²⁵

“*Subject prior sale*²⁶ sixhundred tons available price *onethirty* require twentyfivepercent down-payment balance confirmed credit our order delivery hundredfifty tons monthly starting July answer today will endeavor secure balance if you confirm new price.”

Whipple, on May 21, 1946, telephoned to defendant, and confirmed his conversation by his letter to defendant of May 21, 1946, which is the *second* of the four letters relied upon by plaintiff:²⁷

“Dear Mr. Baglin:

Confirming our telephone conversation of today regarding Argentine Glucose, we quote from cable received today from our principals in Buenos Aires as follows:

‘six hundred tons available price 1.375 (pesos per kilo) require twenty-five per cent down payment balance confirmed credit our order delivery hundred fifty tons monthly starting July answer today will endeavor secure balance if you confirm’

/s/ Engraw.

after our phone conversation we have replied as follows:

²⁵Tr., p. 160; Deft's. Exh. B.

²⁶Emphasis here and elsewhere, unless otherwise noted, has been added.

²⁷Tr., pp. 115-118; Pltf's. Exh. 3.

'accept 600 tons *one thirty seven one half*²⁸ shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation'

/s/ Whipl.

We will advise you immediately we receive their reply.

As we stated we do not feel that they are justified in asking for a cash deposit as advance payment on a deal of this sort and would have so cabled them even before discussing it with you. We do not think that this will 'gum up' the deal and have every expectation that they will confirm promptly and—we hope will be able to complete the 1300 tons for delivery in the last $\frac{1}{4}$ of the year.

to confirm the figures which we gave you:

'The export exchange rate on Argentine pesos is US\$100.00—335.82 pesos or US\$0.29778 per peso at pesos 1.375 per kilogram—US\$0.4094575 per kg.—\$0.18573 per lb. (1 kg—2.2046 lb)

freight rate is \$25 per 40 cu ft. the barrels contain slightly less than 15 cu ft with a net content of 660 lbs. approximately. This will give an equivalent of approximately \$0.0142 per lb. Insurance $1\frac{1}{2}\%$.30c per 100 lbs. .0030. Duty at 2c per lb. .02, giving a landed cost est. 22.293 per lb. The letter of credit should be opened in favor of Cia. Engraw Commercial & Industrial S.A. San Martin 329 Buenos Aires,

²⁸Whipple's cable actually accepted at 1.30 pesos, not 1.375. Tr., p. 161; Deft's. Exh. C.

through the First National Bank of Boston
Buenos Aires

by cable covering the full amount in pesos at 1.357 pesos per kilo net FOB Steamer Buenos Aires expiration Oct. 30th 1946 or as confirmed.

We trust that the foregoing is clear to you and that you can arrange your credit to Cia Engraw as soon as we advise you that we have their final confirmation of the sale.

Confirming our earlier conversation on this subject Cia Engraw has indicated that they will be in a position after Jan. 1st to furnish from 300 to 500 tons monthly at the then prevailing market for glucose and we would appreciate your informing us if you would care to book this production for 1947?

As to quality this glucose is pure corn syrup, crystal clear, testing 43 to 45 Baume. We anticipate receiving a small sample by air express in a few days and will forward it on to you when received. Further we suggest that documents to accompany drafts under letter of credit should include a certificate of analysis as well as a certificate of inspection of the cooerage at time of loading, for insurance purposes.

Thank you for your cordial cooperation in this matter and assuring you of our endeavors that this deal shall work out satisfactorily for all concerned, we beg to remain

Yours very truly,

Harold A. Whipple Co.

By /s/ Harold A. Whipple."

In this last letter Whipple misquoted to defendant the contents of the last two cables by eliminating from plaintiff's cable to him the words "subject prior sale", and by changing the price in both cables from 1.30 pesos to 1.375 pesos.

Under date of May 23, 1946, defendant prepared, but did not then mail, a letter to Whipple, also relating to the conversation of May 21, which stated:²⁹

"This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Commercial & Industrial S.A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price listed is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.

A purchase order will be sent to Cia. Engraw Commercial & Industrial S.A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1948, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

All correspondence will be handled via airmail instead of regular mail, in order to speed this matter."

(Before this letter was mailed, Whipple again telephoned defendant concerning further cables received

²⁹Tr., pp. 123-124; Pltf's. Exh. 5.

by him from plaintiff, and the letter was not mailed until a postscript was added as will later herein appear.)

Whipple cabled plaintiff on May 21, 1946:³⁰

“Accept 600 tons *one thirty* shipments one hundred fifty monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit try ship during June cable confirmation.”

Upon receipt of this cable, plaintiff learned for the first time the identity of the firm with which Whipple was negotiating. Mr. Berger, president of plaintiff, testified with respect to this wire:³¹

“Q. So we understand the contents of it, I will read it: ‘Accept 600 Tons One Thirty,’ that is price, is it not?

A. That is right.

Q. (Reading): ‘Shipments One Hundred Fifty Monthly Will Accept Balance as Available Same Price Schenley Distillers Will Open Credit Entire Amount but No Cash Deposit Try Ship During June Cable Confirmation.’

Now, that is the first time that Mr. Whipple disclosed the name of the party with whom he was conducting this transaction?

A. That is correct.

Q. And it was following that, that you waived or withdrew the cash requirement and agreed to accept a letter of credit?

A. No, we did not withdraw. On receipt of that cable disclosing Schenley Distillers as the purchaser, we went—or I went, in this instance,

³⁰Tr., p. 161; Deft's. Exh. C.

³¹Tr., pp. 362-364.

to the supplier S.A.F.I.R., who was the one requesting the 25 per cent down payment, advising them who the purchaser was and they on the strength of the credit standing of the purchaser withdrew the requirement on the 25 per cent down payment.

Q. Yes. Now, did you know on the 21st of May when you received this cable from Mr. Whipple—rather, on the 22nd of May, I see that is the date, whether he had a contract for the purchase of that or not, by Schenley?

A. Did we know whether he had a *private* contract?

Q. Yes.

A. One would assume that from that telegram.

Q. What telegram are you referring to?

A. That (indicating).

Q. The one I hold. You took the same reliance upon his statement as you did of the first cable I read to you referring to 1300 tons?

A. No. You assumed, in questioning me with regard to the first cable on 1300 pounds and suggested that I made the purchases on that and my answer was that I had not made. Following the cable on the 600 tons, *he* come back answering that and *saying that he will accept* any balance up to 1300 tons and on the basis of that telegram we were ready to act.

Q. You did not know anything other than this wire states, at the time you received this wire, as to the terms of the sale, if any sale had been made by Mr. Whipple to Schenley, that is all you knew about it?

A. *That was the only information I had that Schenley was the purchaser. That is correct."*

Plaintiff, at 2:59 a.m. of May 23, cabled Whipple:³²

“Acting on your cable twentyfirst have completed firm purchases for account Schenley Distillers elevenhundredthirtyfive tons stop Your use night letter lost July August deliveries offered are working on this stop Have closed June delivery fifty tons July sixty August Sept two hundred September onehundredfifty October twoseventyfive November twohundred December twohundred stop As contract is in Argentine pesos assume purchase is covering forward exchange more details tomorrow.”

Later, on the same day, plaintiff cabled Whipple:³³

“Elevenhundredthirtyfive tons total available at one thirty stop Now signing contracts stop Must have confirmed credit ourtel today by Saturday *otherwise sixhundred contract voided* stop Also advise credit for balance immediately stop additional fourhundred tons available subject prior sale at onethirtyfive.”

The “firm purchases” allegedly made by plaintiff and referred to in its cable, Exhibit 7, above quoted, were made in reliance upon Whipple’s cable of May 21st to the effect that 600 tons were accepted and he would “accept balance as available” which in turn has reference to Whipple’s cable of May 20th, in which he purported to accept 1300 tons.³⁴ At this point plaintiff believed and understood that Whipple was confirming a sale for 1300 tons.³⁵

³²Tr., p. 130; Pltf’s. Exh. 7.

³³Tr., p. 163; Deft’s. Exh. E.

³⁴Tr., p. 363.

³⁵Tr., p. 365.

These last two quoted cables interrupted the negotiations between Whipple and defendant with respect to the 600 tons and Whipple wrote the following letter under date of May 23, 1946 which is the *third* of the letters relied upon by plaintiff as follows:³⁶

"Confirming our telephone conversation of this morning we quote the cablegrams received from Engraw in Buenos Aires as follows:

Acting on your cable twentyfirst have completed firm purchases for account Schenley Distillers elevenhundredthirtyfivetons stop your use night letter lost julyaugustdeliveries offered are working on this stop have closed June delivery fifty tons July sixty Augustsept Twohundred September onehundredfifty October twoseventy-five November twohundred December twohundred stop as contract is in Argentine pesos assume purchaser is covering forward exchange more details tomorrow"

/s/ Engraw

"LC Whipl 5-23

Urgent arrange immediately credit our order to cover sixhundred tons stop americanbank cable First Boston here so can meet requirement one supply source market today up five cents"

/s/ Engraw

"You will understand that they confirm actual purchase for your account of 1135 *metric* tons of glucose in accordance with shipping schedule given. That they have committed their personal credit to the suppliers pending receipt of your letter of credit and that they require your credit urgently at the earliest possible moment to sat-

³⁶Tr., pp. 121-122; Pltf's. Exh. 4.

isfy one of their sources of supply who demanded a 25% deposit to hold the lot for you.

Will you please ask your New York office to cable the credit as quickly as possible instead of airmailing same? This is particularly important as the next boat starts loading about the 29th and will sail on June 9.

Your credit should call for a total of 1145 Metric tons approx. before December 31st, allowing partial shipments, *and your purchase order should show* the shipping schedule given 'or more.' We have cabled them again tonight asking them to try to improve the June July deliveries.

We await your confirming letter which you stated is in the mail today. Thank you for your cooperation.

Yours sincerely,
Harold A. Whipple Co.
/s/ Harold A. Whipple''

Defendant confirmed the same telephone conversation by adding to its letter of May 23 above quoted the following postscript and mailing the whole letter to Whipple:³⁷

“P.S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S.A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. *The conditions of acceptance of this quantity are the same as those outlined for the 600 tons.* The

³⁷Tr., pp. 124-125; Pltf's. Exh. 5 (p.s.).

offer of 600 tons is considered superseded by the foregoing."

This last letter is the *fourth* of the letters relied upon by plaintiff and it is the letter pleaded as being either the contract or a memorandum of the contract. Whipple did not advise plaintiff of the conditions contained in the last (fourth) letter until *after* negotiations had terminated.³⁸

On May 23, 1946, Whipple also wrote plaintiff:³⁹

"We therefore confirm the sale of 1135 tons (metric) of glucose 43-45 baume, crystal clear, derived from incomplete hydrolysis cornstarch with a Balling of 81.8 upwards. We have in our possession a confirming letter from Schenley authorizing us to secure up to 1300 tons for them in accordance with your earlier offer. And we have their verbal commitment and assurance that confirming letter is in the mail tonight covering the actual confirmation of the above.

They state that the actual letter of credit and purchase order will be cleared directly to you from their Louisville and New York offices via airmail (we will ask them to cable credit) just as soon as it can be issued.

We have sold this glucose to them at Pesos 1.375 per kg FOB Buenos Aires to include our overage of .075 pesos per kg. which we have asked you to confirm tonight with the understanding that payment will be remitted from the collecting bank here. We hope that you will be able to

³⁸Tr., pp. 191-2.

³⁹Tr., p. 166; Deft's. Exh. F.

improve the shipping schedule for June July as they are most anxious to get larger deliveries as soon as possible.

H. W. Co.”

On May 28th, 1946, five days after the contract here in suit is alleged by plaintiff to have been made, plaintiff cabled Whipple that it could supply Whipple with additional 200 and possibly 400 tons of glucose. Whipple replied to plaintiff on the same day.⁴⁰

“Accept two hundred four hundred tons offered requires one week clear credit confirm stop *Subject successful conclusion present negotiations* Schenley prepared negotiate 1947 production fixed priced basis stop Can arrange two weeks extension trucks if you advise confidence successful conclusion.”

On June 6, 1946, defendant terminated negotiations.

The following matters, while collateral to the question of the creation of a contract, are relevant to other issues.

At the time of this transaction Whipple had never made or completed any transactions with plaintiff.⁴¹

On May 23 Whipple cabled plaintiff:⁴²

“Schenley credit includes our overage you instruct collecting bank remit us from proceeds please cable confirmation this arrangement what results trucks.”

⁴⁰Tr., p. 134; Pltf's. Exh. 9.

⁴¹Tr., p. 365.

⁴²Tr., pp. 167, 168; Deft's. Exh. G.

Plaintiff responded to Whipple by letter dated June 3, 1946, stating in part:⁴³

“Then, I think we should also have an understanding as between yourselves and ourselves with regard to the commissions or overcharges involved. Actually on this particular contract, for the balance of 1946, we have had to make our purchases F.A.S. and after paying the necessary charges, including custom brokers, etc. we will net about 0.5 centavos per kilo but with that, we also have the risk of having to pick up deliveries of glucose if the coordination and the arrival of a steamer should not coincide and this may well cut into our profit margin if we should have any bad luck from a steamer point of view.

I don't know what costs you have on your 7½ centavos per kilo but I believe that we should coordinate our efforts first, in order that there may be a proper division of the commissions or overages available and second, that we may know, in determining the price we can afford to pay, and also in determining the price at which the glucose should be offered.

We certainly want to be fair to you but we believe you also desire to be fair to us and if we are to arrange a program of this sort to carry on in the future, regardless of the price of glucose, it should be with a complete understanding of the manner in which your and our interests will be compensated.

Then too, there is another factor which disturbs me somewhat for I am sure you realize the danger on basing this program entirely on only one

⁴³Tr., pp. 203-207.

customer. In an earlier letter, you mentioned your interest in establishing yourselves as sellers of glucose in many areas of the United States and if we are both 'on the job' you can develop the market and we the sources and establish a continuing business with profit to both of us. But I cannot help but feel that your interest and ours, would be much better served if we not only close a contract with Schenley for the present but that you also develop your other markets using perhaps the other alternative, i.e., a sliding scale alternative until you have your market so developed that with firm contracts we can also cover them for a whole year or a large portion of the year at firm prices.

I shall be most interested to hear from you at an early date with regard to this, but particularly would be interested in word from you as to the development of a more diversified group of customers on whom we both can depend for continuing business as you establish your market and we establish our sources.

.

I cannot help but regret that you did not accept our earlier suggestion on glucose which was along similar lines i.e., that you give us a range and quantities desired and let us take the steps necessary to cover.

Such a condition makes it definitely imperative that we arrange our respective programs with 'all the cards on the table' so that we will both know the manner in which we must deal with the entire program in order that both our organizations may deal with continuing success.

With kindest regards and looking forward to hear from you at a very early date, I am

The issue of plaintiff's ability or inability to have performed the alleged contract, assuming its existence, revolved around the scope of certain written and verbal limitations of the Argentine Government on the exportation of glucose from Argentina. In order to perform any such contract plaintiff would have had to secure an export permit from the Argentine Government.⁴⁴ Permits were not issued for part of the period covered by the alleged contract by reason of the written and verbal orders above mentioned. The question involves the scope of such written and verbal orders.

Mr. Berger testified that he applied for a permit for 935 tons on May 27;⁴⁵ and that earlier in July he made two further applications, one for 200 tons and one for 400 tons.⁴⁶ Although he did not testify specifically as to the existence or absence of any government restrictions upon exports he did say that he could have obtained the permits at any time upon payment of certain taxes levied upon the issuance of such permits.

However, under date of September 30, 1946, plaintiff sent one of its suppliers of glucose a telegram which in part reads as follows ('Translated from Spanish) :

⁴⁴Tr., p. 232, et seq.

⁴⁵Tr., p. 239.

⁴⁶Tr., p. 240.

“Conversation confirmed regarding glucose contracted with you exportation permits were not granted since May last owing to disposition of the Superior Government of the Nation preventing us from fulfilling sales in North America during four months now our clients have left their purchases without effect * * *” (See original Deft’s. Exhibit in appeal file.)

Drs. H. B. Verella and A. Padilla, Argentine attorney witnesses for plaintiff, testified that there was no prohibition against the export of glucose during the period involved but that by written resolution the secretary of Industry and Commerce of the Argentine Government limited the export quota of glucose for the period of July 1st to December 1, 1946, to a total of 400 tons; that this regulation was in force until September 18, 1946, when a second resolution was passed “According to which export of glucose will remain submitted to previous permits which will be granted as soon as domestic requirements are covered.”⁴⁷

The plaintiff’s witness Juan Lang testified that on May 28, 1946, he applied for permits to issue glucose and that the permits were granted on June 11th. He also testified that on June 16, 1946, Argentina proclaimed a campaign of 60 days to reduce the cost of living and that as a result “the export of all Argentine raw materials were prohibited for these 60 days. In connection with this, the export of glucose, too was prohibited—let me say, not the export—can I

⁴⁷Tr., p. 767; see also pp. 756-757 and 765-768.

correct? The issuing of new export licenses for glucose was prohibited.”⁴⁸ Lang also indicated that further orders were made in August or September⁴⁹.

Defendant’s witness Dr. M. Robiola, an Argentine attorney, testified that there was a verbal order prohibiting exportation of glucose from May 1, 1946, to August 9, 1946, which verbal order was followed by written resolutions dated August 29th and September 18, 1946.⁵⁰

Dr. M. Caranza, also an Argentine attorney witness for defendant, testified that by verbal order made the first part of May, 1946, the secretary of Industry and Commerce prohibited the issuance of permits for the export of glucose and to withhold permits already granted but not handed over to the exporters. Caranza also testified to the existence of the written resolutions passed in August and September.⁵¹ Caranza’s testimony is confirmed by defendant’s witness Dr. A. C. Magdalena.⁵²

III.

SPECIFICATION OF ERRORS.

Defendant contends that the trial Court erred in

1. Finding, as it did in finding no. 6, that a contract was created between the parties, and in find-

⁴⁸Tr., p. 967.

⁴⁹Tr., p. 990.

⁵⁰Tr., p. 897.

⁵¹Tr., pp. 910-911.

⁵²Tr., pp. 930-931.

ing that defendant and plaintiff agreed to the terms of such contract as set out in that finding, and erred in making all later findings based upon the existence of such a contract.

2. Finding, as it did in findings nos. 5 and 12 that plaintiff was ready, willing and able to perform the alleged contract.

3. Failing to find upon the issue as to whether Whipple was or was not the agent of plaintiff.

IV.

ARGUMENT.

A. NO CONTRACT WAS CREATED BETWEEN THE PARTIES.

1. Preliminary statement.

On the question of whether a contract was created, there is no conflict in the evidence. All of the material evidence is in writing, as, indeed, it must be in order to avoid the bar of the statute of frauds. It has been and is the position of defendant that as a matter of law no contract was created between the parties. There were negotiations between the parties, but these negotiations never culminated in an agreement or a meeting of the minds.

Early in the negotiations, Mr. Whipple, the broker, in his desire to complete a sale which would result in very substantial profit to him, misstated facts to and misled plaintiff as to the state of his negotiations with defendant. Plaintiff appeared hesitant to enter

into any sale with Mr. Whipple up to the time that plaintiff learned the identity of the firm with which Whipple was dealing. Thereupon plaintiff made commitments with its own suppliers which would put it into a position to carry out any agreement which might be made between the parties. The evidence clearly shows, we submit, that both Mr. Whipple and plaintiff, in their enthusiasm to make a very substantial sale, acted in a manner unjustified by the facts and, that this suit as an attempt to obtain relief from the consequences of their own imprudent and premature actions.

We will show :

(1) That there was no meeting of the minds between the parties on the terms of any given contract, and none as to the contract alleged ;

(2) That the parties intended and understood that any agreement which might be made between them would be made by formal purchase order, accompanied by a letter of credit ; and

(3) That assuming, for argument's sake only, a meeting of the minds as to the terms of the proposed agreement, defendant at no time unequivocally accepted such terms.

We will discuss these points, which are independent and not cumulative, in the order set forth.

2. The minds of the parties never met with respect to any given agreement.

There is no question but that a contract can be created by a series of letters. To accomplish this there

must be an offer; that particular offer must be accepted unequivocally; the offer and acceptance must be such that, at a given point, the minds of the parties meet with respect to material terms of the contract. However, a person cannot impose a contract upon a correspondent by selecting several isolated letters and putting them together without regard to the fundamental doctrines relating to the creation of a contract as plaintiff here attempts to do.

The first letter involved was that written under date of May 20, 1946, by defendant to Whipple⁵³ which stated in part that:

“We are *interested* in purchasing up to one thousand tons * * * further, if your prospective buyer does not take the 300 tons, we would like the *opportunity* to purchase this quantity in addition to the 1,000 tons.

It is understood that we will be purchasing by letter of credit direct from the Argentine Shipper,
* * *

We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit. * * *”

This letter is certainly not an offer. It is an expression of interest and an invitation to open negotiations.

On the basis of this expression of “interest”, Whipple on May 20 cabled plaintiff.⁵⁴

“Confirming sale 1300 tons glucose * * *”

⁵³Quoted in full on pages 6-7 above.

⁵⁴Quoted in full at page 7 above.

At this point, of course, Whipple had made no sale to defendant. There was no sale at all unless there was one from plaintiff to Whipple. This is the first attempt by Whipple to distort an existing "interest" into a binding commitment.

However, plaintiff replied to Whipple's cable on the same day, May 20, 1946, and rejected the sale or offer to purchase—whichever Whipple's cable constitutes—saying:⁵⁵

"You cannot delay 12 days and expect the same price * * *"

Plaintiff did not act on Whipple's cable.⁵⁶ On the next day, however, plaintiff cabled Whipple that "subject to prior sale" it could supply 600 tons at 1.30.⁵⁷ Whipple immediately communicated with defendant and, while purporting to quote the cable, changed it in the following respects:

1. He eliminated the words "subject to prior sale".
2. He raised the quoted price from 1.30 pesos to 1.375.⁵⁸

The legal effect of the first change was to convert plaintiff's cable from an invitation to make an offer to a firm offer. The substance of the conversation of May 21, 1946, between Whipple and defendants with respect to this cable is confirmed in the *body* of the letter dated May 23rd written to Whipple by defendant,⁵⁹

⁵⁵Quoted in full at page 7 above.

⁵⁶Tr., p. 363.

⁵⁷Quoted in full at page 8 above.

⁵⁸See Pltf's. Exh. 3, quoted above on pp. 8-10.

⁵⁹See Pltf's. Exh. 5, quoted above on p. 11.

which contains an acknowledgment of the offer of 600 tons and adds a number of conditions with respect to cooperage, steamship line, purchase order, letter of credit.

This letter would not have been an acceptance of the alleged offer for two reasons: it contains no words of acceptance and secondly, it contained new conditions which under any view would make it at most a counter-offer. Whipple, however, on the same day (May 21, 1946), cabled plaintiff:⁶⁰

“Accept 600 tons 130 shipments 150 monthly will accept balance as available same price Schenley Distillers will open credit entire amount but no cash deposit price shipped during June cable confirmation.”

Whipple did not advise plaintiff of the conditions expressed in the telephone conversation and confirmed in defendant's letter. His “acceptance” of any “balance” over 600 tons was purely gratuitous and has no foundation in the conversation with defendant. Finally, the statement “no cash deposit” is a definite variation of the terms of the alleged offer. This was obvious to Whipple for he added the words “cable confirmation”.

Again at this point the most we have under any circumstances is a counter-offer from *Whipple* (not defendant) to plaintiff. The last quoted cable represents a second attempt by Whipple to conclude a contract when he knew no agreement had been reached.

⁶⁰Tr., p. 161; Deft's. Exh. C.

Further, the proposed contract that he cabled about was one still concerning a contemplated 1300 tons. All that defendant acknowledged was an offer of 600 tons.

The last quoted cable is significant also in that for the first time plaintiff is told the identity of the firm with which Whipple is negotiating. It is evident that the reason for this disclosure was to obviate the necessity of a cash deposit.⁶¹ The testimony and wording of the cable makes this clear.

Whipple's effort to stimulate the creation of the contract for the 600 tons was interrupted at this point by another cable from plaintiff, which apparently concurred in Whipple's reliance upon defendant's responsibility, for the cable stated:⁶²

“Acting on your cable 21st *have completed firm purchases* for account Schenley Distillers 1135 tons * * *”

At this point it is difficult to see what plaintiff was relying upon even if we were to assume that Whipple was plaintiff's agent. If the latter is the case plaintiff must be held to know that not only was defendant's communication a mere “acknowledgment” of the offer of 600 tons, but if it were to be construed as an acceptance, it went to only 600 tons. Under no circumstances could defendant possibly be bound to accept any “balance as available”. The only basis upon which plaintiff could have acted in making the

⁶¹Tr., p. 362.

⁶²Quoted in full on page 14 above.

commitments for the 1135 tons was by using all of the various offers and counter-offers, proposals and counter-proposals without regard to the state of negotiation when each was written and without regard to the rejections of them. To exemplify this, plaintiff's commitment was expressly made in reliance upon Whipple's cable of May 21st to the effect that 600 tons were accepted and "will accept balance as available" which in turn has reference to Whipple's cable of May 20, which purported to accept 1300 tons on the basis of defendant's expression of "interest". Plaintiff acted in spite of the fact that plaintiff itself rejected the attempt by Whipple to purchase 1300 tons; the fact that defendant did not agree to purchase 1300 tons but merely expressed an interest in negotiating with respect thereto; and the fact that defendant never stated that it would accept any glucose and at this point in the negotiations its letter acknowledged only the 600 ton offer. Therefore, it cannot be denied that plaintiff in purchasing 1135 tons on May 22nd, could not have been acting for defendant, nor acting pursuant to any agreement between it and defendant. It is further to be noted that plaintiff knew nothing of the additional conditions contained in the main body of defendant's letter to Whipple dated May 23, 1946, and did not learn of them until June 6, 1946.

The situation then, on May 22nd, was that defendant and Whipple were negotiating for a purchase of 600 tons. *At the same time*, plaintiff, under the assumption that defendant was committed to purchase

“up to 1300 tons” purchased, for defendant’s account, 1135 tons.

Whipple received plaintiff’s cable concerning the 1135 tons before defendant mailed its letter acknowledging the 600 ton offer. Whipple, on receiving the cable, telephoned defendant, and the ensuing conversation was reduced to writing by Mr. Donnelly by adding a postscript to the letter previously written, dated May 23rd, and referring to the 600 ton offer. The whole letter to Whipple reads:⁶³

“Gentlemen:

This will confirm our telephone conversation and your letter of May 21st.

We hereby acknowledge the offer of Cia. Engraw Comercial & Industrial S.A., of 600 tons of glucose made from pure corn syrup, crystal clear, and testing between 43 and 45 Baume, at a price of 1.375 pesos per kilogram. The price is f.o.b. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each. *Shipment is to be made via McCormick Steamship Co. to San Francisco or Los Angeles.*

A purchase order will be sent to Cia. Engraw Comercial & Industrial S.A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos. Expiration date will be October 30, 1948, or as confirmed. Shipment of this material is to be at a rate of 150 tons a month.

⁶³Tr., pp. 123-124; Pltf’s. Exh. 5.

All correspondence will be handled via air mail instead of regular mail, in order to speed this matter.

Very truly yours,
Schenley Distillers
Corporation

By /s/ J. B. Donnelly.

JBD:LP

P.S. Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Comercial & Industrial S.A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. *The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.*”

It is this last letter which plaintiff contends is either the contract or a memorandum of the contract. Plaintiff however thought that by its cable of May 22nd it was accepting an offer which had been made in the May 21st cable from Whipple relating to 1300 tons at 1.30 pesos per kilo.⁶⁴ If Whipple was acting as principal rather than as agent, it is true that plaintiff was accepting an offer—Whipple’s offer. Plaintiff now claims that its May 22nd cable was not an acceptance but an offer, and that Schenley accepted that offer by the letter last quoted. Mr. Berger testified that he believes Whipple’s cable of May 21st was

⁶⁴See memo. from Mr. Berger to Dichter (an employee of defendant) on pages 300-302 of the Transcript.

a firm offer for up to 1300 tons and that he acted upon it as such. He stated:⁶⁵

“A. That is dated May 21st and received by us on the 22nd.

Q. That is the one—you made no purchases firm on his account until you received this cable that you have pointed out, that is Defendant’s Exhibit C?

A. That is correct.

Q. So we understand the contents of it, I will read it: ‘Accept 600 Tons One Thirty,’ that is price, is it not?

A. That is right.

Q. (Reading): ‘Shipments One Hundred Fifty Monthly Will Accept Balance as Available Same Price Schenley Distillers Will Open Credit Entire Amount but No Cash Deposit Try Ship During June Cable Confirmation.’ Now, that is the first time Mr. Whipple disclosed the name of the party with whom he was conducting this transaction?

A. That is correct.

Q. And it was following that, that you waived or withdrew the cash requirement and agreed to accept a letter of credit?

A. No we did not withdraw. On receipt of that cable disclosing Schenley Distillers as the purchaser, we went—or I went, in this instance, to the supplier S.A.F.I.R., who was the one requesting the 25 per cent down payment, advising them who the purchaser was and they on the strength of the credit standing of the purchaser withdrew the requirement on the 25 per cent down payment.

⁶⁵Tr., pp. 362 and 364.

Q. Yes. Now, did you know on the 21st of May when you received this cable from Mr. Whipple—rather, on the 22nd of May, I see that is the date, whether he had a contract for the purchase of that or not, by Schenley?

A. Did we know whether he had a *private* contract?

Q. Yes.

A. One would assume that from that telegram.

Q. What telegram are you referring to?

A. That (indicating).

Q. The one I hold. You took the same reliance upon his statement as you did of the first cable I read to you referring to 1300 tons?

A. No. You assumed, in questioning me with regard to the first cable on 1300 pounds and suggested that I made the purchases on that and my answer was that I had not made. Following the cable on the 600 tons, he come back answering that and saying that he will accept any balance up to 1300 tons and on the basis of that telegram we were ready to act.

Q. *You did not know anything other than this wire states, at the time you received this wire, as to the terms of the sale, if any sale had been made by Mr. Whipple to Schenley, that is all you knew about it?*

A. *That was the only information I had that Schenley was the purchaser. That is correct."*

In addition to the above, we will show later herein that Whipple knew that negotiations actually were leading to an offer to be made by defendant in the form of a purchase order and covering letter of credit.

The complete confusion of the state of negotiations up to and including May 23, 1946, is evidenced by the fact that plaintiff was selling glucose at 1.30 pesos per kilo. Defendant, however, was given to understand that the price was to be 1.375 pesos. Plaintiff has sued on the basis of the latter price, but since it never claimed that price, its claim is arbitrary and unsupportable.

Further, while plaintiff is suing on the basis of a contract for 1135 tons, it thought that it had and was performing a contract for either 1300 or 1535 tons and it *actually purchased* 1535 tons. In other words, *the very contract* upon which plaintiff purports to sue was believed by it to be one for 1535 tons, not 1135, and at a price of 1.30 pesos, not 1.375. There is no claim whatever that defendant ever undertook to purchase 1535 tons.

There is no point in the foregoing correspondence at which the minds of plaintiff and defendant met with respect to any given contract for any given amount of glucose at any given price. There was at no time anything more than negotiation.

The evidence shows also that the parties realized that this was the case for on May 28th, five days after the contract is alleged to have been made, plaintiff cabled to Whipple that it could supply Whipple with an additional 200 and possibly 400 tons of glucose. On the same day Whipple cabled plaintiff:⁶⁶

⁶⁶Pltf's. Exh. 9.

“Accept 200-400 tons offered required one week clear credit confirm stop *Subject successful conclusion present negotiations* Schenley prepared negotiate 1947 productions fixed price basis stop * * *”

As late as May 28, 1946, therefore, Whipple knew that no agreement had been reached and that negotiations leading to a purchase order and covering letter of credit were still in progress.

Even assuming, however, it might be said that the minds of the parties had met with respect to certain broad general outlines of an agreement, nevertheless there are a number of material elements of the alleged contract on which the minds of the parties never met.

The evidence from the exhibits shows that the letter of credit was a vital element in the negotiations.⁶⁷ The evidence also shows that there are several kinds of letters of credit,⁶⁸ and that plaintiff needed an irrevocable letter of credit.⁶⁹ In plaintiff's letter to Mr. Whipple, it is stated that no assurance is to be given Mr. Whipple with regard to his “overage” until the *particular terms* of the letter of credit were examined. There was, then, no agreement between the parties on this material item; indeed Mr. Donnelly testified without contradiction that the terms of the proposed letter of credit, other than as to price and expiration date, were never discussed.⁷⁰

⁶⁷Tr., p. 162, Deft's. Exh. D; Tr., p. 163, Deft's. Exh. E; Tr., pp. 121-122, Pltf's. Exh. 4.

⁶⁸Tr., pp. 688-689.

⁶⁹Tr., p. 244.

⁷⁰Tr., p. 689.

Whipple's letter of May 23, 1946, demanded that the expiration date on the letter of credit be December 31, 1946. Donnelly's letter of May 23, 1946 (on which plaintiff places principal reliance) provides that the expiration date on the letter of credit will be "October 30, 1946, or as confirmed".

Donnelly's letter of May 23, 1946, specifically requires that shipment be made by McCormack Steamship. This is a material direction to make delivery to a particular agent. It was first mentioned in this letter and had not heretofore been discussed by any of the parties.⁷¹ There is no evidence that Whipple agreed to this condition, and for that matter no evidence that he had any authority to agree on behalf of plaintiff. Further, the evidence shows that plaintiff knew nothing about this condition or any of the others contained in defendant's May 23rd letter until after defendant had terminated negotiations on June 6th.⁷² The materiality of this condition is demonstrated by plaintiff's written expression of concern about shipping facilities even before it learned that defendant would demand one certain carrier be used.⁷³

There was no discussion whatever of metric tons as such. The quantity was discussed only in tons. A metric ton is of course 2204.6 pounds, which fact is a proper subject of judicial notice.

⁷¹Tr., pp. 691-692.

⁷²Tr., p. 192.

⁷³Tr., p. 204; Pltf's. letter to Whipple dated June 3, 1946.

Plaintiff had no knowledge whatever of any of the "conditions" other than the condition relating to the issuance of a purchase order and letter of credit contained in Donnelly's letter of May 23rd until after negotiations had terminated.

Not only was there no meeting of minds on these points; there could not have been because plaintiff never knew of their existence. If knowledge of the conditions is to be imputed to plaintiff because it has established that Whipple was its agent, still there was no acceptance by Whipple or plaintiff of these additional conditions.

The most that could be said of defendant's May 23rd letter, which plaintiff relies upon as being the contract, is that it was a counter-offer which was never accepted.

The following authorities demonstrate that under the law, no contract can be created on the basis of the above facts.

Section 1585 of the California Civil Code provides:

"An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal."

In *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 79 P. 275, a contract for the sale of oil was sought to be created on the basis of two letters. The letter of acceptance followed the offer in all particu-

lars, except to add that the "15° Baume" be "at a temperature of 60° fahrenheit". In concluding that no contract had been created, the Court said at page 624:

"The rules for determining whether or not a proposal and acceptance constitute a binding contract are well settled, and by this court have been expressed in the following language: 'To constitute a binding contract made in this form [letters] there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract. (1 Wharton on Contracts, sec. 4.) A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. (*National Bank v. Hall*, 101 U.S. 43, 51.) An offer imposes no obligation, unless it is accepted upon the terms upon which it was made. (*Tilley v. County of Cook*, 103 U.S. 161.) An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. (Civ. Code, sec. 1585.)' (*Wristen v. Bowles*, 82 Cal. 84. See, also, *Yore v. Bankers etc. Assn.*, 88 Cal. 609.)"

In *Yore v. Bankers etc. Assn.*, 88 Cal. 609, 26 P. 514 the Court stated at page 615:

" 'An acceptance, to be good, must of course be such as to conclude an agreement or contract between the parties. And to do this it must in every respect meet and correspond with the offer, neither falling within or going beyond the terms proposed, but exactly meeting them on all points, and closing with them just as they are stated.' "

In *Williston on Contracts* (Revised Edition) page 222, there appears the following general statement of the law:

“A conditional acceptance is in effect a statement that the offeree is willing to enter into a bargain differing in some respect from that proposed in the original offer. The conditional acceptance is, therefore, itself a counter-offer and rejects the original offer, so that thereafter even an unqualified acceptance of that offer will not form a contract.

There are numerous decisions on the question whether a particular acceptance is conditional. A few of these may be given as illustrations. An acceptance ‘subject to the terms of a contract being arranged’ between the parties’ lawyers is conditional, *and no acceptance is good which contains the condition that subsequent arrangement is to be made concerning any of the terms of the bargain*. So a reply to an offer to sell real estate accepting the offer if the title is satisfactory to the buyer’s attorney is not a valid acceptance, since it seems on a proper interpretation of the reply that the offeree thereby imposes as a condition of the bargain the favorable opinion of his own lawyer as distinguished from the standard established by the law. A reply to an offer of the unexpired term of a lease that the offeree accepted subject to the lessor’s assent creates no contract. So an offer to sell land is not accepted by a reply which though in terms accepting the offer at the outset, imposes the condition that certain additional deeds be turned over; or that a sum to be paid for an option should be credited on the price if the option was exercised. A reply

imposing the requirement of a bond is conditional. So a reply to an offer to sell land, directing that the deed be sent to another state where payment will be made, since such a reply imposes the condition that the place of payment shall be other than that where it would have been on a true interpretation of the offer, and an alteration of the place of payment is fatal to the existence of a contract. *A reply altering in any way the method of payment or performance*, or making new stipulations as to quality, or the title of property for sale invalidates an acceptance. These illustrations might easily be multiplied. Even the requirement of an acknowledgment has been held a fatal addition."

See also:

Howard v. Chow, 27 C.A. (2d) 755, 81 P. (2d) 994;

Ellingsworth v. Shannon, 161 Ore. 106, 88 P. (2d) 293;

12 *Am. Jur.* 545;

17 *Corp. Jur.* Sec. 378;

6 *Cal. Jur.* 61;

Roffinella v. Roffinella, 191 Cal. 753, 758, 218 P. 397;

Vanhoosen v. Briscoe, 85 Cal. App. 746 at 749, 259 P. 1115.

Actually, there was no given point in the negotiations at which a contract could have been created, for there was no point at which there was any agreement upon such basic elements as quantity and price. However, even if quantity and price had been determined

on May 23, 1946, there still could not be any contract, for the alleged letter of acceptance (defendant's letter of May 23) contained additional, material conditions, and could constitute, at most, a counter-offer which was never accepted.

3. It was understood between the parties that a contract would be created, if at all, by a formal purchase order.

Even if it be assumed that all of the terms of the proposed contract were decided and agreed upon, nevertheless the evidence shows without substantial conflict that no agreement was to exist until a purchase order was issued and signed by plaintiff and defendant.

In the very first letter written by defendant upon the subject of glucose⁷⁴ it is stated:

“We will be expecting information from you which will enable us to issue our purchase order and covering letter of credit.”

From the very first sign of interest by defendant, therefore, Whipple knew that defendant intended to contract, if at all, by purchase order. Indeed, even in the absence of the specific expression, it would be unduly naive of an experienced import broker to think that a purchase of this size (about \$500,000) would be accomplished by a business firm such as defendant without a formal document committing the seller as well as itself to the sale, and upon definitely prescribed terms. Further, the established practice in the export

⁷⁴Pltf's. Exh. 2, quoted above in full at pp. 6-7.

business, even from the standpoint of the foreign seller, is not to deem himself committed until he has received not only a committing document from the purchaser, but a covering letter of credit establishing payment for the goods. In that manner, both seller and buyer are protected since the shipments are made against the letter of credit and payment is made against documents of title to the goods.⁷⁵

However, Whipple's understanding that no contract would be created except by purchase order is shown by more than inference. In his letter to defendant of May 23, 1946, relative to the 1135 tons, *Whipple* specifically states:⁷⁶

"Your credit should call for a total of 1145 Metric tons, * * * and your purchase order should show the shipping schedule given 'or more'."

Again, in Donnelly's letter of May 23, 1946, defendant's intention with regard to the necessity of a purchase order is reaffirmed in this language:⁷⁷

"A purchase order will be sent to Cia. Engraw Commercial & Industrial S.A. as soon as possible covering this purchase, and a letter of credit will be set up to cover the full amount in pesos."

On May 23, 1946, Whipple cabled plaintiff:⁷⁸

"SCHENLEY ISSUING PURCHASE ORDER CREDIT YOUR FAVOR DIRECTLY FROM NEW YORK 1135 TONS SOONEST POSSIBLE TRY IMPROVE JUNE JULY SHIPMENTS."

⁷⁵Tr., pp. 635-636.

⁷⁶Pltf's. Exh. 4, quoted above in full at pp. 15-16.

⁷⁷Pltf's. Exh. 5, quoted above in full at p. 11.

⁷⁸Tr., pp. 168-169; Deft's. Exh. H.

Also on May 23, 1946, *Whipple* wrote *Engraw* a letter, in which he states:⁷⁹

“They (Schenley) states that the *actual* letter of credit and *purchase order* will be cleared directly to you from their Louisville and New York offices via airmail * * *”

In addition to the above, *Donnelly* testified as follows with regard to the necessity of a purchase order:⁸⁰

“Q. At the end of that conversation you attached this postscript (referring to *Donnelly's* May 23, 1946 letter to *Whipple*) and I am calling your attention to the expression in the next to the last sentence—last two sentences, rather: ‘The conditions of acceptance of this quantity are the same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing.’ Was that subject discussed between you and Mr. *Whipple* in the May 24th conversation just preceding the writing?

A. I don't understand your question. What do you mean by ‘was that subject discussed?’

Q. Was the question of the conditions, the condition of the issuance of a purchase order and a letter of credit——

A. Oh, yes.

Q. —in the manner you have described?

A. When Mr. *Whipple* called me on the 24th * * * I told Mr. *Whipple* that I had written him a letter acknowledging the 600 tons, and mentioned to him about the letter of credit and the purchase order. And then he told me over the phone that he had a new offer of 1135 tons and

⁷⁹Tr., p. 166; Deft's. Exh. F.

⁸⁰Tr., pp. 690-692.

gave me completely new shipping dates. And I told him that I would acknowledge that offer with the same conditions as the 600 tons.

* * * * *

Q. This may be a repetition. Referring both to the purchase order and the letter of credit was there any discussion between you and Mr. Whipple in any of the conversations as to the contents and makeup of either document?

A. No, sir; there was not."

(and the following testimony of the same witness on cross-examination)⁸¹

"Q. You personally had the authority to sign that purchase order or any purchase order or that or any other amount right here on the Pacific Coast, didn't you?

A. Yes; I would say that I have the authority.

Q. So there wasn't any reason for you to have to send this thing back to Cincinnati?

A. Is that a question?

Q. That is a question.

The Court. Yes.

A. The reason was that because sugar or glucose is something that I normally do not purchase on the West Coast. I prefer always having that handled in Cincinnati, our main office; and then, secondly, the amount was pretty large and I would prefer our head purchasing organization to handle the purchase order for \$600,000.

The Court. Let me inject a question. Did you inform Mr. Whipple of either or both of those reasons?

⁸¹Tr., pp. 693-701.

The Witness. A. No; I did not inform him of the reasons. No sir.

The Court. You merely told him that the purchase order would have to be issued?

The Witness. That is right.

The Court. In the East?

The Witness. That is right.

* * * * *

By Mr. E. B. Stanton. By that you were referring to this formal purchase order which you have identified?

A. Yes, sir.

Q. You have arranged for the purchases many times prior to this occasion without the signature of the formal purchase order, haven't you?

* * * * *

A. I have made arrangements, but none of them have ever been concluded until a purchase order is issued and signed, because that is a rule of our corporation.

* * * * *

By Mr. E. B. Stanton. You say that you never advised Mr. Whipple at any time that you would require the signature of Engraw in South America to the purchase order or any other document, did you?

A. No; I did not personally advise Mr. Whipple of that.

Q. You did not direct anyone to advise him of that fact, did you?

A. I did not direct anyone. I just told Mr. Whipple that I would get a purchase order. A purchase order automatically requires a signature, as I said before, to complete the deal.

* * * * *

By Mr. E. B. Stanton. Q. I call your attention now to this purchase order which is Defendant's Exhibit No. U. On the reverse of the purchase order you will note 'TERMS AND CONDITIONS'. Will you detail here and now which of those terms and conditions you discussed with Mr. Whipple over the telephone?

A. I discussed none of these terms and conditions with Mr. Whipple over the telephone.

Q. You did not tell him about any one of them?

A. Certainly not. All I told Mr. Whipple was that he would receive a purchase order, and, as I stated before, I expect him to read the fine print."

Again, on May 28, five days after the date on which plaintiff now claims a contract was made Whipple in a cable to plaintiff characterized the proceedings to that date as being "negotiations" yet to be consummated. The only inference to be drawn is that the negotiations had not yet culminated in the purchase order.

The foregoing written and oral evidence demonstrates the fact that both parties understood that no contract was to be created other than by formal purchase order, covered by a letter of credit.

The law pertinent to this fact precludes the existence of a contract until the formal purchase order is prepared and signed.

In *Dexter v. Ankiewicz*, 26 Cal. App. (2d) 326, 79 P. (2d) 400, it is stated, on page 333:

“This is the sole question necessary to be determined: *Does the foregoing correspondence constitute a binding contract between plaintiff and defendant?*

This question must be answered in the negative. Where the parties understand that before a contractual relationship shall exist the terms of their contract are to be reduced to writing and signed by them, a binding or completed contract does not arise until a writing evidencing the terms of their agreement has been executed by the respective parties. (*Mercantile Trust Co. v. Sunset etc. Co.*, 176 Cal. 461, 469 [168 Pac. 1037]; *Spinney v. Downing*, 108 Cal. 666, 668 [41 Pac. 797].)

In the instant case it is clear from the portions which we have italicized of the correspondence set forth above that both plaintiff and defendant contemplated that acceptance by defendant of plaintiff's offer should be signified by defendant's signing and returning the contract which accompanied plaintiff's letter to defendant dated November 23, 1935.

Therefore, applying the above-mentioned rule of law to these facts, it is evident that defendant did not accept plaintiff's offer in the manner contemplated by the parties, and hence defendant never entered into a binding or subsisting obligation with plaintiff.”

In *Spinney v. Downing*, 108 Cal. 666, 41 P. 797, the Court said, at page 668:

“We think it clear that the alleged contract counted upon by defendant Downing in his cross-complaint never became a completed contract. It

appears without conflict that it was the understanding and agreement between the plaintiff and Downing that the proposed contract should be reduced to writing, and signed by both parties. This fact is made very clear by the evidence. The paper as drawn up was signed by Downing, but for some reason which does not appear never was signed by the plaintiff Spinney. It therefore never became a binding or subsisting obligation upon either. It is a general rule to which this case presents no exception that, when it is a part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other."

In *Toms v. Hellman*, 115 Cal. App. 74, 1 P. (2d) 31 it is stated at page 83:

"For another reason, the acceptance of the offer failed to make a contract, because the offer by its terms clearly contemplated that the complete contract should be embodied in a written contract to be subsequently executed. The word 'subscribe' in the phrase 'the signers * * * are willing to cause the company to subscribe to the following procedure' clearly implies a subsequent written contract. The sentence: 'We are willing to say that the committee as tentatively selected is agreeable to us in working out the necessary arrangements to carry the plan through'—shows that the letter was merely a tentative basis for

negotiation, which was to culminate in a final written agreement. That the bondholders so understood it, is proven by the following statement in their acceptance: 'It is understood that upon receipt by you of written expressions of approval from the holders of 75% in face value of outstanding bonds of the above company that the June 1st, 1926, coupons will be paid and *the necessary steps will then be taken to effectuate this plan.*' (Italics ours.)''

It is defendant's contention that the record shows without substantial conflict that this case is within the rule of the authorities last discussed, and that upon this ground alone, the judgment should be reversed.

4. There was no absolute, unequivocal acceptance of any offer.

Even assuming, for the sake of argument only, that the terms of the proposed agreement between the parties were all clear and that a meeting of the minds had been had with respect to them, and that it was not the intention of the parties to contract only by purchase order, nevertheless there was no agreement created because defendant at no time made any absolute or unequivocal acceptance of any offer.

The law is clear with regard to the type of assent necessary to constitute an acceptance of an offer. An acceptance, to create a contract, must be clear, absolute and unequivocal. This requirement is separate and distinct from, and independent of, the proposition that an acceptance must be unqualified and unconditional. In other words, an indication of as-

sent which is unconditional and unqualified may nevertheless be inadequate as an acceptance of an offer because it is equivocal.

In *Williston on Contracts* (Rev. Ed.), pages 207 to 209, it is stated:

“An acceptance must be positive and unambiguous. This requirement is often treated as identical with the requirement dealt with in the following sections that an acceptance must not change, add to, or qualify the terms of the offer; and such changes or qualifications undoubtedly prevent an acceptance from being positive and unequivocal. But even though no change in the offer is suggested in the reply of the offeree, it nevertheless may not so clearly indicate assent to the offer as to create a contract. Thus a reply to an offer to lease premises in the following terms was held *not* to make a binding contract: ‘I have decided on taking No. 22 Belgrade Road, and have spoken to my agent Mr. C., who will arrange matters with you.’ The same is true of a telegram to a bidder for public work, ‘You are low bidder. Come on morning train;’ also of the following reply to an offer to sell coal ‘telegram received. You can consider the coal sold. Will be in Cleveland and arrange particulars next week.’ Likewise a reply to an offer to sell land, ‘Have twice attempted the tender of the first payment of \$500 upon the agreement made between us on the 7th of December last. I will meet you, etc., when I shall be ready to make tender of the money and execute the proper agreements thereupon,’ is insufficient. An acknowledgment of an order which stated that

the order will receive best attention, or prompt attention, has also been held not an acceptance, since it implies no promise to comply with the terms of the order. * * *"

Section 1585, California Civil Code, provides in part:

"An acceptance must be absolute * * *"

In *Four Oil Co. v. United Oil Producers*, 145 Cal. 623, 79 P. 366, referred to above, the Court said on this point (p. 624):

"An acceptance must be absolute and unqualified."

See also:

Las Palmas etc., Distillery v. Garrett & Co.,
167 Cal. 397, 139 P. 1077;

Patterson v. Clifford F. Reid, Inc., 132 Cal.
App. 454, 23 P. (2d) 35;

Restatement of the Law, Contracts § 58;
17 Corp. Jur. § 381.

In the light of the foregoing, the postscript to Donnelly's letter of May 23, 1946, falls far short of constituting an acceptance. The postscript is expressly equivocal and conditional. It reads:

"Since dictating the above, we wish to acknowledge and accept the offer of Cia. Engraw Commercial & Industrial S. A., of 1135 tons with a shipping schedule as follows: June—50 tons; July—60; Aug.-Sept.—200; September—150; October—275; November—200; December—200. *The conditions of acceptance of this quantity are the*

same as those outlined for the 600 tons. The offer of 600 tons is considered superseded by the foregoing."

The "conditions" referred to were set forth above in the main body of the letter quoted from. They included the following: (1) a purchase order to be sent to plaintiff; (2) the use of a particular, specified carrier; (3) a letter of credit to expire on October 30, 1946, or as confirmed, instead of the expiration date of December 31, 1946, as asked for by Whipple.

No reference whatever is made to the fact that plaintiff demanded "confirmed credit" "by Saturday" without which 600 tons were voided, or to plaintiff's demand for "immediate" advice as to credit for the balance. And it is important to bear in mind that plaintiff did not know of any of these conditions or the failure to agree upon the credit stipulation.

Therefore, assuming that there has been a meeting of the minds, Donnelly's letter of May 23, 1946, is not legally sufficient to constitute an acceptance. Indeed, the letter of May 23 transcends the rule relating to the necessity for an unequivocal acceptance; it is *expressly* qualified and conditional.

Actually, the letter of May 23 was merely another step in the course of negotiations leading up to a purchase order. But even giving it greater significance, it falls far short of being an acceptance. When a contract is sought to be created by a series of let-

ters, the letter of acceptance must rigidly and completely conform to the letter of offer. We have shown above, in connection with our argument on other points, that not only did Donnelly's letter vary some of the terms of the offers made through Whipple (e.g., the expiration date of the letter of credit) but it also added new conditions (the requirement that shipment be made via McCormick Steamship, and, if plaintiff denies that it contemplated a purchase order, the issuance of such a purchase order). Further plaintiff's cable of May 23 required two acts, in addition to a promise, namely: (1) "confirmed credit" "by Saturday" for 600 tons, and (2) "immediate" advice as to credit for the balance. Neither of these acts was done.

In this connection, one further point is noteworthy. When plaintiff purchased the 1135 tons, and sent its cable of May 23, it thought that it was *accepting* an offer made in Whipple's cable of May 21, wherein Whipple "accepted" 600 tons and the "balance as available." Admittedly, defendant had made no offer as of May 21. Therefore, the only offer which plaintiff could have accepted by its cable and purchase of 1135 tons was one made by Whipple for and on his own account. In any event, Schenley was not at that time bound by any contract.

Plaintiff thought, therefore, that it was accepting an offer to buy any amount of glucose up to 1300 tons. It now says that by virtue of this intended "acceptance" of one contemplated contract, a later

communication from defendant converted plaintiff's purported "acceptance" of one contract into an "offer" to make a *different* contract.

Since different contracts are contemplated by the two communications (plaintiff's of May 23 and defendant's letter dated May 23), defendant's letter could not be an acceptance.

B. WHIPPLE WAS NOT PLAINTIFF'S AGENT.

The confusion in the correspondence placed in evidence can be resolved, we submit, in but one manner: by recognition of the fact that Whipple was acting not as agent of plaintiff, but independently, for and on his own account as principal. It is defendant's position that the evidence supports no other conclusion.

Whipple testified that he has been self-employed as an export-import broker for many years.⁸² He had not completed any dealings with plaintiff before this matter arose.⁸³

On April 3, 1946, plaintiff wrote Whipple regarding availability of glucose. The letter states in part:⁸⁴

"Our commission will be only 1%. Accordingly, we hope that you will be in a position to reserve for us from your commission an equitable part for it is only fair that if *your consumer* can obtain a lower price *you can obtain* a higher com-

⁸²Tr., p. 105.

⁸³Tr., p. 365.

⁸⁴Tr., pp. 199-200; Pltf's. Exh. 18.

mission. We shall await further word from you on this matter.”

We have already referred, in our discussion with respect to “meeting of the minds,” to the misrepresentations made to plaintiff by Whipple. These are misrepresentations *only* if Whipple *were* an agent. For example, his cable of May 20⁸⁵ which purported to “confirm” a sale of 1300 tons of glucose was perfectly proper if Whipple was binding himself. If, however, he were reporting to plaintiff as an agent, he made a gross misrepresentation, for there is no evidence whatever, and no contention made by plaintiff here, that defendant made *any* offer, or accepted any offer, at or prior to the date of that cable. The same is true as to Whipple’s representation that he had a letter “committing” defendant to purchase up to 1300 tons,⁸⁶ and as to accepting 600 tons and “balance as available.”⁸⁷

Plaintiff’s answer to Whipple’s cable is clearly the answer of one person dealing with another at arm’s length. It states:⁸⁸

“You cannot delay twelve days and expect same price market fluctuating seriously immediate answer required *if interested* at one twenty eight
* * *”

Plaintiff at no time expressed any interest in the identity of Whipple’s contemplated purchaser. As

⁸⁵Deft’s. Exh. A, quoted in full above at p. 7.

⁸⁶Tr., p. 166; Deft’s. Exh. F.

⁸⁷Deft’s. Ex. C, quoted in full above at p. 12.

⁸⁸Pltf’s. Exh. 20, quoted in full above at pp. 7-8.

a matter of fact, Whipple told them only when it was necessary to establish financial responsibility to avoid a 25% deposit. Berger, in an inter-office communication dated August 2, 1946, stated:⁸⁹

“Under the circumstances and knowing that Schenley was the purchaser, we took the steps necessary to obtain as much of the balance at the same price as possible. * * * and the suppliers now knowing Schenley as the purchaser dropped the requirement for a cash deposit requiring only the normal opening of the letter of credit.”

Upon receipt of Whipple's first cable, which purported to accept 1300 tons, plaintiff, as late as *August 2, 1946*, wrote that it considered Whipple to have been acting for the *purchaser*. Mr. Berger, plaintiff's president, wrote:⁹⁰

“After numerous cables during April and May covering the subject of the sale of glucose thru Mr. Whipple in Los Angeles, we finally received a telegram under date of May 20th *accepting for parties then unknown to us*, an offer for 1300 tons which we had made on April 24th and May 9th.”

Certainly, if Whipple were acting as plaintiff's agent (which plaintiff claims) he could not have “accepted” for defendant, the purchaser.

The next fact is that Whipple made his agreement with plaintiff for the sale of the glucose at 1.30 pesos per kilo. Then, *without advising plaintiff*, he nego-

⁸⁹Tr., p. 301; Pltf's. Exh. 33.

⁹⁰Tr., p. 300; Pltf's. Exh. 33.

tiated with defendant for the sale at 1.375 pesos per kilo. The only conclusion possible from this is that Whipple was acting independently, and for his own account as principal. It is not permissible for an agent to make an undisclosed profit on his principal's transaction. It is to be noted also that at no time did plaintiff object to this on the ground that Whipple acted in excess of his right. Plaintiff did, however, complain that it was "unfair" that Whipple should make a greater profit on the transaction being negotiated than did plaintiff.

Whipple actually bargained with defendant individually, and on terms different than those stated by plaintiff. For example, in his offer to defendant contained in the letter dated May 21st (plaintiff's Exh. 3) he purported to quote plaintiff's cable of May 21 but, in addition to raising the price, he eliminated the words, "subject to prior sale." Again, the alleged letter of acceptance (Pltf's. Exh. 5) contains conditions. *Whipple never advised plaintiff of the conditions contained in that letter until after defendant terminated negotiations.*⁹¹ When Whipple realized that if a sale materialized his whole price of 1.375 pesos per kilo would be paid directly to plaintiff he cabled plaintiff on May 23 as follows:⁹²

"Schenley credit includes our overage you instruct collecting bank remit us from proceeds please cable confirmation this arrangement what results trucks."

⁹¹Tr., p. 190.

⁹²Tr., pp. 167-168; Deft's. Exh. G.

Upon receipt of this cable, *plaintiff learned for the first time* the “price” of the glucose in the “contract” that it here alleges had already been made between *it* and defendant. Although Whipple raised the price to defendant from 1.30 to 1.375, he “accepted” plaintiff’s offer at 1.30. The conclusion is inescapable: he accepted for his own account.

Whipple also wrote plaintiff on the same day:⁹³

“*We* have sold this glucose to them at Pesos 1.375 per kg. FOB Buenos Aires to include *our* *overage* of .075 pesos per kg. which *we* have asked you to confirm tonight with the understanding that payment will be remitted from the collecting bank here.”

This letter clearly shows that Whipple conducted the negotiations as principal.

Plaintiff’s reply casts further light on the relations between it and Whipple.⁹⁴

“Then, I think we should also have an understanding as between yourselves and ourselves with regard to the commissions or overcharges involved. Actually, on this particular contract, for the balance of 1946, we have had to make our purchases F. A. S. and after paying the necessary charges, including custom brokers, etc. we will net about 0.5 centavos per kilo but with that, we also have the risk of having to pick up deliveries of glucose if the coordination and the arrival of a steamer should not coincide and this

⁹³Tr., p. 166; Deft’s. Exh. F.

⁹⁴Tr., pp. 202-207; Pltf’s. Exh. 19.

may well cut into our profit margin if we should have any bad luck from a steamer point of view.

“I don’t know what costs you have on your 71½ centavos per kilo but I believe that we should coordinate our efforts first, in order that there may be a proper division of the commissions or overages available and second, that we may know, in determining the price we can afford to pay, and also in determining the price at which the glucose should be offered.

“We certainly want to be fair to you but we believe you also desire to be fair to us and if we are to arrange a program of this sort to carry on in the future, regardless of the price of glucose, it should be with a complete understanding of the manner in which your and our interests will be compensated.

* * * * *

“I cannot help but regret that you did not accept our earlier suggestion on glucose which was along similar lines i.e., that you give us a range and quantities desired and let us take the steps necessary to cover.

“Such a condition makes it definitely imperative that we arrange our respective programs with ‘all the cards on the table’ so that we will both know the manner in which we must deal with the entire program in order that both our organizations may deal with it with continuing success.

“With kindest regards and looking forward to hear from you at a very early date, I am, * * *”

If Whipple were plaintiff’s agent, plaintiff would *instruct* him as to the price of the goods. It would

control and direct Whipple's activities within the scope of his agency.

The above correspondence establishes the significant fact that plaintiff had no responsibility for the payment to Whipple of his "overage," and that it had no obligation to compensate Whipple at all. In a communication to defendant dated July 8, 1946, in stating costs to it of cancellation of its commitments, plaintiff stated:⁹⁵

"* * * these calculations don't cover Whipl will you deal with him directly."

Mr. Berger testified:⁹⁶

"Q. Yes. Now did you know on the 21st of May when you received this cable from Mr. Whipple—rather on the 22nd day of May, I see that is the date, whether he had a contract for the purchase of that or not, by Schenley?

A. Did we know whether he had a *private* contract?

Q. Yes.

A. One would assume that from that telegram."

Whipple's own testimony on the point of agency is the following:⁹⁷

"Q. Calling your attention, Mr. Whipple, to the third from the last paragraph and reading from the letter—fourth from the last paragraph:

⁹⁵Tr., p. 289; Pltf's. Exh. 31.

⁹⁶Tr., p. 363.

⁹⁷Tr., pp. 195-196.

‘As you can see, our position—yours and ours—is that of only intermediaries and only as such can we reach to a conclusion.

‘Our commission will be only 1%. Accordingly, we hope that you will be in a position to reserve for us from your commission an equitable part for it is only fair that if your consumer can obtain a lower price you can ask a higher commission. We shall await further word from you as to this matter.’

Does that refresh your recollection to any degree regarding the arrangement that you had concerning this difference between 1.30 and 1.375 which you quoted?

A. Yes. We had discussed in previous correspondence two or three alternative methods of handling this business, one which I had urged upon them was that I should act strictly as their representative and that any overage which was established here could be participated in on a basis to be agreed upon between us. Another, that I should act as a buying agent for the domestic user, collecting a buying commission from the user here.

There had been no definite commitment at the time that this transaction was negotiated which of those methods would be used. The original understanding from this letter which you have just shown me was that they would quote for the account of the supplier down there. Subsequently their cable, cabled instructions, was that the letter of credit should be opened in their name. I therefore assumed that they had adopted and accepted the second method which I had suggested of working directly for them, rather than for some-

one else down there whom I did not know and was not in a position to judge whether I could trust or not.

Q. Did you ever receive confirmation of their acceptance of the second method in writing?

A. No."

Plaintiff's attorney then asked Whipple to read again plaintiff's letter to Whipple dated June 3, 1946.⁹⁸ Upon doing so, Whipple said:⁹⁹

"A. Mr. Stanton, in view of this letter I would like to change my previous testimony.

By Mr. E. B. Stanton. Q. Has that letter refreshed your recollection in any regard?

A. This letter refreshes my recollection to the extent that they did in fact on June the 3rd confirm the arrangement as to our overage.

Q. Would you read the portion of the letter which calls that to your attention?

A. 'I note your second last paragraph with regard to your overage and we have confirmed that we will take the steps necessary to see that you receive this. Just how this can be arranged, I am not certain and of course, we are awaiting the receipt of the letter of credit so that we can know its terms and will then discuss the matter with the First National Bank of Boston here in order to determine the method whereby we can protect you for your coverage and take the steps necessary to see that you obtain it.'

Q. When they speak of 'overage' that means your commission, does it, as selling agent?

A. That is right.

⁹⁸Tr., pp. 202-207, quoted above on pp. 19-21.

⁹⁹Tr., pp. 200-201.

Mr. E. B. Stanton. I will ask that this letter be introduced as Plaintiff's next in order.

The Court. It may be received.

The Clerk. Plaintiff's Exhibit 19 in evidence."

We say that the trial court erred in failing to find on this issue, and, further, that the record demonstrates that Whipple was not plaintiff's agent; that he was acting independently and that if any contract was created during these negotiations, it was a contract between plaintiff and Whipple. Such a contract would result from Whipple's cable of May 21, 1946, wherein he accepted 600 tons and "balance as available." It cannot be denied, and it is not denied, that at that time defendant had neither offered nor accepted anything.

**C. PLAINTIFF COULD NOT HAVE PERFORMED
THE ALLEGED CONTRACT.**

As a part of its proof, plaintiff has the burden of showing that it was ready, willing and *able* to perform the alleged contract. The law does not permit a recovery on a contract by one who could not himself have performed.

Restatement, Contracts, Secs. 280, 277, 274, 281;

3 *Williston on Contracts* (Rev. Ed.), 2346 to 2348; 2464-2465;

U. S. Trading Corp. v. Newmark Grain Co., 56 Cal. App. 176, 205 P. 29;

9 *A. L. R.* 1508, 1509;

Wilson v. Alcatraz Asphalt Co., 142 Cal. 182,
75 P. 785;

Klauber v. San Diego Street Car Co., 95 Cal.
353, 30 P. 555;

Sample v. Fresno Flume Co., 129 Cal. 222, 61
P. 1085.

The question here, then, is whether the evidence shows, without real conflict, that plaintiff could not have performed. We contend that it does.

The alleged contract called for delivery of the goods in installments during the months of June to December inclusive, 1946.

After September 1, 1946, plaintiff negotiated a settlement with his own Argentine suppliers. During these negotiations it stated to one of them in a wire:¹⁰⁰

“Conversation confirmed regarding glucose contracted with you exportation permits were not granted since May last owing to disposition of the Superior Government of the Nation preventing us from fulfilling sales in North America during four months now our clients have left their purchases without effect * * *”

This statement was made to an *Argentine supplier of glucose* who, it must be presumed, knew, or could easily ascertain, whether glucose could be exported.

Nevertheless, plaintiff's own president—Mr. Berger—testified that he could have secured permits for the exportation of glucose during the period here

¹⁰⁰Deft's. Exh. V.

involved merely by paying the taxes.¹⁰¹ *But he did not make this statement in connection with the existence or absence of government restrictions.* On the latter matter, he was silent.

Plaintiff's expert witnesses, Varella and Padilla, denied the existence of any verbal order of prohibition, but did admit that there were written orders, one in August limiting glucose exports to a total of 4,000 tons for the period July to December, 1946, and providing that the permits "will be granted after proof of the *exporters* that they themselves have delivered for the internal consumption a quantity double to that for which they seek exportation."¹⁰² A second resolution was made in September, 1946, plaintiff's experts testified, "according to which exportation of glucose will remain submitted to previous permits which will be granted as soon as the domestic requirements are covered."¹⁰³

Plaintiff's only other witness on this point, Juan Lang, testified:¹⁰⁴

Q. Do you know whether there was any such prohibition made in the month of May, 1946?

A. No.

Q. Was there any such order made later than May, 1946?

A. Yes.

Q. When, if you know?

A. In June.

¹⁰¹Tr., pp. 254 to 258.

¹⁰²Tr., p. 767.

¹⁰³Tr., p. 767.

¹⁰⁴Tr., pp. 966-967.

Q. About what time in June, do you remember?

A. It was——

Mr. Bronson. Well, I will object to the question. Excuse me a moment, sir. I will object to the question that it calls for hearsay, and I am merely following counsel's objections to the same evidence in the depositions that have already been in evidence from the South American witnesses.

Mr. L. B. Stanton. I can't hear you.

The Court. Read the question to me.

(Last part of record read by the reporter.)

The Court. All this testimony may be made the subject of a motion to strike. When all this evidence is in we can tell whether it is properly admissible or not. Overruled. Did you answer? You may answer the question.

A. 16th of June, our Government on that date proclaimed the campaign of 60 days to reduce the cost of living. In connection with this official campaign it was given a very great publicity. The export of all Argentine raw materials was prohibited for these 60 days. In connection with this the export of glucose, too, was prohibited—let me say, not the export—can I correct? The issuing of new export licenses for glucose was prohibited.”

Lang also testified that this order did not affect *licenses or permits already granted*.¹⁰⁵ He did not say, however, that it had no effect on *applications* there-

¹⁰⁵Tr., p. 969.

tofore made. Plaintiff had made *applications* for permits but did not receive any.

It is clear from plaintiff's own witnesses, therefore, that there were serious restrictions upon the exportation of glucose. Plaintiff, however, offered no proof whatever that it could have complied with the conditions of the written resolutions referred to by its own experts. Further, there is no answer plaintiff can make to the testimony of its own witness Lang who said that unless a permit had *theretofore been granted*, exports of glucose for 60 days after June 16, 1946, were prohibited.

Defendant's witnesses, three Argentine lawyers, testified that when the new Peron administration came to power in Argentina, various controls were placed on exports.

Dr. Magdalena summarized the situation with respect to glucose as follows:¹⁰⁶

"Many resolutions and dispositions have been dictated covering this subject by these departments, stating which articles could be exported, which could not, and the formalities to be observed by the exporters in all cases. These dispositions have been numerous and many of course are not concerned with glucose. In connection with the exportation of glucose, the Executive Power dictated through the Secretariat of Industry and Commerce, the following resolutions which I think are the only ones directly concerned with this product: 5109, 6926 and 7499, copies

¹⁰⁶Tr., p. 930.

of 6926 and 7499 are attached by Dr. Robiola to his deposition. 5109 states that in order to obtain export permits for glucose, the exporters must previously prove that they have turned in to the Government 1% of the maize harvest prior to and including 1945, and if after this date must show that the maize to be exported has been obtained from I. A. P. I. (Instituto Argentino Promocion Intercambio.) There was also a verbal order given by Dr. Rolando Lagomarsino, Secretary of Industry and Commerce, during the first days of May 1946, prohibiting the export of glucose for a period of time during which a study would be made of the market in general, and of glucose in particular. At the same time he requested retention by the Secretariat of Industry and Commerce of export permits already granted but not yet handed over to the exporters.”

Dr. Carranza testified:¹⁰⁷

“On 29th. August, 1946, the Secretariat of Industry and Commerce dictated resolution 6926, which limited to Exhibit 5 4000 tons the exportable quota of glucose during the period 1st. June, 1946 to 30th June 1946. On 18th. September, 1946, the Secretariat of Industry and Commerce passed resolution 7499, in which it is stated that the Exhibit 6 export of glucose will be submitted to prior permits which will be granted only when home consumption requirements have been taken care of.

According to data which I have, the Secretariat of Industry and Commerce dictated a resolution during the first part of May, 1946, prohibiting

¹⁰⁷Tr., pp. 910, 911, 920, 921.

the export of glucose. This resolution, according to my information, was in the form of a verbal order given by the Secretary of Industry and Commerce, with the object in view of making a complete study of the market conditions in general, with particular reference to glucose, ordered all the persons working under him to refuse export permits for glucose, and to withhold permits already granted but not handed over to the exporters.

* * * * *

I cannot cite the decision of any court on this matter, but I can affirm what I have already stated, that the Secretariat of Industry and Commerce is fully authorized by laws and decrees to regulate the exportation of products; no merchandise can be exported without permission of the Secretariat of Industry and Commerce, so whatever may be the legal aspects of the verbal order, it is a positive and concrete fact that unless permits are granted by the Secretariat of Industry and Commerce, products may not be exported.

* * * * *

According to this, my opinion would vary or would not vary. If permit to export glucose was made after 1st. May, 1946, my opinion would vary because this would mean that even though order had been given to the contrary, permit was granted, but the fact that glucose was exported in the period under review does not change my opinion, because permits once granted and handed over to the exporter, are valid for 180 days, so that permit authorized in November of 1945, would call for glucose to be exported in May,

1946, and a permit granted in December, 1945, would permit exportation of Glucose in June, 1946, and so on. According to information I have, Engraw did not have an export permit prior to 1st. May, 1946, so no export could be made."

Dr. Robiola testified substantially to the same effect as Drs. Magdalena and Carranza.¹⁰⁸

On the basis of the above testimony, we contend that the trial court erred in holding that plaintiff sustained its burden of proving its ability to perform the alleged contract. The record fails to show that plaintiff brought itself within the restrictions testified to by its own witnesses.

V.

CONCLUSION.

Defendant respectfully submits that upon any and each of the grounds above discussed, the judgment of the trial court should be reversed with directions that judgment be entered in favor of defendant and against plaintiff.

Dated, San Francisco, California,
November 28, 1949.

Respectfully submitted,

BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,

*Attorneys for Defendant and Appellant,
Schenley Distillers Corporation.*

¹⁰⁸Tr., p. 897.

IN THE
United States Court of Appeals
For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E. INDUS-
TRIAL S. A. (a corporation),

Plaintiff and Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION
(a corporation),

Defendant and Appellee,

and

SCHENLEY DISTILLERS CORPORATION
(a corporation),

Defendant and Appellant,

vs.

COMPANIA ENGRAW COMERCIAL E. INDUS-
TRIAL S. A. (a corporation),

Plaintiff and Appellee.

BRIEF OF APPELLEE

SCHENLEY DISTILLERS CORPORATION.

BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,

Mills Tower, San Francisco 4, California,

Attorneys for Defendant and Appellee

Schenley Distillers Corporation.

FILED

DEC 20 1949

AUL P. O'BRIEN,

CLERK

Subject Index

	I.	Page
Preliminary statement		2
	II.	
Statement of the pleadings and jurisdiction		3
	III.	
Statement of the case		5
A. The issues		5
B. The facts		6
(1) Facts bearing upon the issue of whether the negotiations following June 6, 1946, were, as found by the trial Court, to settle any claimed liability, or, as plaintiff contends, merely extended the delivery dates		7
(2) The rate of exchange		14
(3) Market price		15
(4) Glucose was subject to "futures" contracts.....		19
	IV.	
Argument		19
A. Measure of damages		19
B. Duty to minimize damages		26
C. Damages for the breach of a contract to purchase future commodities are fixed as of the date of the breach		39
D. Plaintiff elected to treat defendant's repudiation as termination of the contract and damages should be computed as of the date of the repudiation.....		43
E. The current rate of exchange was properly adopted in assessing damages		50
F. Computation of damages and other points		53
	V.	
Conclusion		53

Table of Authorities Cited

Cases	Pages
Alderson v. Houston, 154 Cal. 1, 96 Pac. 884.....	44
Atkinson v. District Bond Co., 5 Cal. App. (2d) 738, 43 P. (2d) 867	45
Boston Iron & Metal Co. v. Rosenthal, 68 Cal. App. (2d) 564, 156 P. (2d) 963	21
Boyles v. Kingsbaker Bros. Co., 5 Cal. (2d) 68, 53 P. (2d) 141	34
Bu-Vi-Bar Petroleum Corp. v. Krow, 10 Cir., 40 F. (2d) 488	45
Canton-Hughes Pump Co. v. Llera, 123 C.C.A. 397, 205 F. 209	38
Central Lumber Co. v. Arkansas Valley Lumber, 86 Kan. 131, 119 P. 321	33
Chozo Yano v. Ledman, 188 N.Y.S. 764.....	33
Crane Iron Works v. Cox & Sons Co., 3 Cir., 28 F. (2d) 328	27, 28
Cron & Dehn v. Chelan Packing Co., 158 Wash. 167, 290 P. 999	33, 39
Dolfin v. Bruesselbach, 111 Colo. 525, 143 P. (2d) 1014....	34
Fruit Growers Express Co. v. Citizens Ice and Fuel Co., 271 Ky. 330, 112 S.D. (2d) 54.....	33
Goldsmith v. Stiglitz, 228 Mich. 255, 200 N.W. 252.....	30
Lamsas Flour Mills Co. v. Brandt, 98 Kans. 587, 158 P. 1120	34
Liberty Nat'l Bank v. Burr (D.C., E.D. Ga.), 270 Fed. 251	51
Lineman v. Schmidt, 32 Cal. (2d) 204, 195 P. (2d) 408....	25, 48
McNeff v. White Eagle Brewing Co., 294 Ill. App. 37, 13 N.E. (2d) 493	47
Renner Co. v. McNeff Bros., 6 Cir., 102 F. (2d) 664, cert. den., 60 S.Ct. 92, 308 U.S. 576, 84 L. Ed. 983.....	26, 39
Rice v. Schmid, 18 Cal. (2d) 383, 115 P. (2d) 498.....	47
Rice v. Schmid, 25 Cal. (2d) 259, 153 P. (2d) 313.....	47
Roth & Co. v. Taysen, 73 L.T.R. 628	33
S. P. Mill Co. v. Billiwhack Stock Farm, Ltd., 50 Cal App. (2d) 79, 122 P. (2d) 650	24

	Pages
Samuels v. E. F. Drew & Co. (D.C., S.D., N.Y.), 286 Fed. 278	30, 31, 39, 41
Sheldon v. Argos Mercantile Corp., 183 N.Y.S. 513.....	33
The Hurona (D.C., S.D. N.Y.), 268 Fed. 910.....	51
The Saigon Maru (D.C., D. Ore.), 267 Fed. 881.....	51
Tillis v. Western Fruit Growers, Inc., 44 Cal. App. (2d) 826, 113 P. (2d) 267	34
Tillman v. Russo Asiatic Bank, 2 Cir., 51 F. (2d) 1023....	52
United States v. Burton Coal Co., 273 U. S. 337, 47 S. Ct. 351, 71 L. Ed. 670	27, 29
United States v. Harris, 9 Cir., 100 F. (2d) 268.....	42
United States v. Homestake Mining Co., 54 C.C.A. 303, 117 F. 481	38
Vitagraph, Inc. v. Liberty Theatres Co., 197 Cal. 694, 242 P. 709	27

Codes

Civil Code, Section 3358	50
28 U.S.C. Sections 1291, 1294, 1332	4

Texts

34 A.L.R. 114, 115	47
44 A.L.R. 215	47
44 A.L.R. 242	47, 48
15 Am. Jur. 448	46
46 Am. Jur. 752	47
25 C. J. Sec. 561	51
6 Cal. Jur. 460	45
8 Cal. Jur. 785	27
22 Cal. Jur. Sec. 121	34
47 Mich. Law Rev. 538, page 545 (1949)	38
"Money in the Law", Prof. Arthur Nessbaum, 1939 ed., page 487	51
16 N.Y.L.Q. 559	51
Restatement of Contracts, Section 336(2)	34
Williston, Contracts, Section 1335	44, 45

No. 12,261

IN THE

**United States Court of Appeals
For the Ninth Circuit**

COMPANIA ENGRAW COMERCIAL E. INDUS-
TRIAL S. A. (a corporation),

Plaintiff and Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION
(a corporation),

Defendant and Appellee,

and

SCHENLEY DISTILLERS CORPORATION
(a corporation),

Defendant and Appellant,

vs.

COMPANIA ENGRAW COMERCIAL E. INDUS-
TRIAL S. A. (a corporation),

Plaintiff and Appellee.

BRIEF OF APPELLEE

SCHENLEY DISTILLERS CORPORATION.

I.

PRELIMINARY STATEMENT.

In this action for breach of contract, a judgment was rendered in favor of plaintiff¹ in the sum of \$5,845.25, with interest from June 6, 1946.² Plaintiff has appealed from this judgment claiming that the trial court erred in several respects in determining the amount of damages. Defendant has also appealed, claiming that the trial court erred in holding that a contract existed between the parties or that plaintiff could have performed any contract found to exist.

This brief is a response to plaintiff's opening brief and is limited to the issue of damages. Defendant does not concede that plaintiff is entitled to damages in any amount, but the basis for this contention is the subject of the briefs filed in connection with defendant's cross-appeal from the judgment.

In this responding brief, therefore, it is necessary, for the sake of argument, to assume that a contract existed between the parties which plaintiff could have performed. Upon such assumption, defendant contends that the trial Court correctly assessed damages in the sum of \$5,845.25.

¹To avoid confusion on these cross-appeals, the parties will be designated herein as plaintiff and defendant rather than as appellant and appellee.

²Tr. p. 70. (All references will be to the pages of the printed transcript.)

II.

STATEMENT OF THE PLEADINGS
AND JURISDICTION.

In plaintiff's complaint,³ amended complaint,⁴ and amendment to amended complaint,⁵ it pleads that defendant breached a contract entered into between the parties on May 23, 1946, under which plaintiff sold 1135 tons of Argentine glucose to defendant, at a price of 1.375 pesos per kilo, to be delivered in monthly installments over the months of June, 1946, to December, 1946, both inclusive; that payment was to be made at an exchange rate of 335.82 Argentine pesos to 100 American dollars.⁶

In its original complaint, plaintiff pleaded that it purchased glucose in Argentina at a price of 1.20 pesos per kilo to enable it to perform the contract, and that after incurring certain costs for export, it would have realized a profit of \$34,685.72.⁷ In the amended complaint plaintiff alleged market prices of from 60 to 57 centavos per kilogram over the period of the contract; plaintiff took these alleged prices, added other costs of performance, and arrived at an allegation of damages in the amount of \$212,427.99. This figure apparently represents the difference between cost to plaintiff of performance on the facts alleged, and the contract price.⁸ In a second count in

³Tr. p. 2.

⁴Tr. p. 18.

⁵Tr. p. 54.

⁶Tr. pp. 4, 20.

⁷Tr. p. 5.

⁸Tr. pp. 22 and 23.

the amended complaint, plaintiff alleged that it "sold and disposed of the whole of said 1135 tons of glucose" on April 9, 1947; that the *market price* on that day was 50 centavos per kilogram, and the cost of preparing the glucose for export was 15 centavos per kilogram; that the difference between the *cost to plaintiff* of this "sale" on April 9, 1947, was \$219,686.13, which sum, when deducted from the contract price, left \$245,034.55, for which plaintiff prayed judgment.⁹

By motions to dismiss and to make more definite statement, defendant challenged the allegations of damages and the measure of damages sought to be pleaded in both complaints,¹⁰ but all such motions were denied.¹¹ All of the above allegations were put in issue by defendant.

As stated by plaintiff, jurisdiction of the District Court is based upon 28 U.S.C. 1332, and jurisdiction of this Court is based upon 28 U.S.C. Sections 1332, 1291 and 1294. The allegations in the pleadings of the jurisdictional facts are found at pages 18 and 45 of the transcript.

⁹Tr. pp. 24 and 25.

¹⁰Tr. pp. 11, 30 to 33, 38 to 40.

¹¹Tr. pp. 17, 44.

III.

STATEMENT OF THE CASE.

A. THE ISSUES.

Plaintiff's appeal relates solely to the issue of damages.

The trial court held¹² that: (1) the damages recoverable by plaintiff are the difference between the contract price and the market price of the glucose on June 6, 1946;¹³ (2) there was a continuous market for glucose in Buenos Aires both for export and domestic consumption;¹⁴ (3) the applicable market price was the *export* market price which, on that date, was 1.35 pesos per kilo;¹⁵ and (4) plaintiff was entitled to recover only such number of American dollars as would purchase, on the date of the judgment, the amount of pesos in which plaintiff had been damaged.¹⁶ The trial Court also found that certain dealings between the parties after June 6, 1946, were negotiations to settle the dispute between plaintiff and defendant and did not contemplate a reinstatement of the contract, nor did they relate to any agreement to postpone deliveries called for by the contract.¹⁷

Plaintiff contends that (1) damages should be measured by the differences between contract price and the market prices on the respective delivery dates;

¹²Tr. pp. 62 to 69.

¹³Tr. pp. 59, 67, 69.

¹⁴Tr. p. 66.

¹⁵Tr. p. 66.

¹⁶Tr. p. 67.

¹⁷Tr. p. 65.

(2) the proper market price to be used in the formula was the *price at which it, plaintiff*, could have *purchased*, rather than the price at which it could have *sold*; (3) the market price to be taken is the *domestic* (Buenos Aires) rather than the *export* market price; (4) the finding of an export market price on June 6, 1946, of 1.35 pesos per kilo is unsupported by the evidence; and (5) plaintiff is entitled to have the judgment for American dollars computed at an exchange rate which would enable it to purchase substantially more pesos than the amount in which it was allegedly damaged. Plaintiff also contends that the evidence compels the conclusion that negotiations after June 6, 1946, were for the purpose of delaying deliveries to defendant.

Plaintiff's statement of facts does not include all of the matters which we deem relevant to the above issues. We will, therefore, present the facts and then demonstrate the correctness of the trial Court's judgment with respect to damages.

B. THE FACTS.

We will state the facts in chronological order but will attempt to group those pertinent to the contentions on this appeal.

- (1) Facts bearing upon the issue of whether the negotiations following June 6, 1946, were, as found by the trial Court, to settle any claimed liability, or, as plaintiff contends, merely extended the delivery dates.

On June 6, 1946, defendant informed plaintiff by telephone that it was terminating negotiations for the sale of glucose,¹⁸ and on the following day, wired to plaintiff:¹⁹

“Following our telephone conversation of yesterday, and in response to your request that said conversation be confirmed in writing. We advise that we are not entering into any agreement with CIA Engraw Commercial and Industrial SA for the purchase of glucose.”

In its original complaint, plaintiff alleged:²⁰

“That on or about the 7th day of June, 1946, defendant repudiated said contract and notified said plaintiffs by telegram to proceed no further therewith.”

In its amended complaint, plaintiff pleaded:²¹

“That plaintiff immediately thereafter commenced negotiations with said defendant and said defendant actively and continuously negotiated with said plaintiff for the completion of said contract and deliveries thereunder up to and until the 18th day of September, 1946; that on or about said 18th day of September, 1946, said defendant definitely refused to accept any deliveries under or pursuant to said contract.”

¹⁸Tr. p. 143.

¹⁹Tr. p. 144; Pltf's. Exh. 13.

²⁰Tr. p. 5.

²¹Tr. pp. 21-22.

Upon receiving defendant's June 6th notice, plaintiff wired defendant²² on June 8, 1946:

"You received ours giving specifications of contracts purchased for your account and laboratory test June shipment glucose stop We believe we are entitled courtesy cable reply stop We are not speculators and if you don't desire coverage will liquidate but if loss occurs must protect our interests stop If glucose desired please cable number letter credit so can proceed June shipment stop For personal reference Reuben Hays Firstnational Cincinnati"

Several days later defendant responded to plaintiff²³ by cable to Buenos Aires:

"Replying your cable our negotiations have been carried on with Whipple Los Angeles who has been kept fully informed of our position regret exceedingly confused situation which has developed and suggest you advise me Schenley Newyork of extent of your uncancellable commitments also telephoning Whipple today."

In response plaintiff cabled defendant on June 14th, 1946²⁴:

"Accordance your cable and to eliminate confusion are cabling Whipple extent uncancellable commitments and amount liquidation damages."

²²Tr. pp. 279-280; Pltf's. Exh. 28.

²³Tr. p. 283; Pltf's. Exh. 29.

²⁴Tr. p. 285; Pltf's. Exh. 30.

On June 24, 1946, Mr. L. B. Stanton, one of plaintiff's attorneys of record, acting for plaintiff and Whipple wrote defendant as follows:²⁵

"In respect to the contract between yourselves, on the one part, and Compania Engraw Commercial & Industrial S. A. and Harold A. Whipple on the other part, for glucose to be shipped from Argentina:

"We have today reviewed the entire correspondence, letters, cables and telephone conversations; with this in view, the writer today phoned to Mr. Berger at Buenos Aires, and as a result of that telephone call and our former communications, we state as follows:

"The difference between the contract selling price to your corporation and the purchase price of the glucose in question—\$59,146.55

"As a result of your refusal to comply with the contract, our people have suffered damages for cancellation in the sum of—\$31,750.00

"A total damage of—\$90,896.55

"As against this, you are entitled to 5 centavos difference between the F.A.S. and F.O.B. contract of—\$16,899.02

"Net damage to our people to date of—\$73,997.53

"We wish to further advise that unless this account is settled promptly the cancellation costs will unquestionably increase, and thereby the loss to which our people have been placed will likewise increase.

²⁵Tr. pp. 845-847; Deft.'s. Exh. R-3.

“You must understand that our people entered into contracts for purchase of glucose under the contract with you, in order to comply with your requirements as specified in your shipping instructions, and although we have done everything in our power to minimize the loss, the figure as stated of \$31,750 is our least cost in case of present cancellation.

“*I understand that there is every expectation that the market will change so as to increase this loss.*²⁶ Please let us know immediately as to your disposition so that we can be advised as to further procedure.”

On June 26, 1946, defendant replied to Mr. Stanton:²⁷

“We have your letter of June 24, which refers to a contract between this company and Cia Engraw Commercial & Industrial, S. A. and Harold A. Whipple for glucose to be shipped from Argentina.

As we have informed you on the telephone, there is *no such contract in existence.*”

On June 24th Mr. Dichter who was in South America on business for defendant was instructed by defendant as follows:²⁸

“June 24, 1946.

“Statement for Dichter:

During the month of May Schenley thought they would require a very large quantity of glu-

²⁶Emphasis here and elsewhere is added unless otherwise noted.

²⁷Tr. p. 847; Deft's. Exh. R-3.

²⁸Tr. pp. 324-325; Pltf's. Exh. 40.

cose. Personnel on the Pacific Coast negotiated with Whipple, a Los Angeles broker, with CIA. Engraw Comercial & Industrial, S. A. (address: San Martin 329, Buenos Aires) for 1,135 tons of Argentine glucose, the price to be 1.375 pesos per kilogram, C.I.F. Los Angeles. This figures out 0.22293¢ per lb. f.o.b. Los Angeles, including 2¢ duty. The above for shipment as follows:

Terms—Sample to be approved, letter of credit for the full value to be opened in favor of Engraw. The same was never submitted and the credit was never opened and it develops that Schenley does not need this material. Therefore, we asked for cancellation of any responsibility due to negotiations. Engraw appears willing to cancel but is asking 2¢ per pound to cover loss.

I suggest you proceed to Buenos Aires immediately to learn the following:

- (1) The present situation and price of glucose in the Argentine.
- (2) Is glucose in short supply?
- (3) Is export license required?"

On July 8, 1946, a cable prepared by plaintiff, Dichter and Berger was sent to defendant:²⁹

"Cancellation here would cost approximately fortyfivethousand Dollars stop However opening of lettercredit would atonce eliminate penalty to extent of thirtythousand dollars and would provide necessary time for orderly liquidation over contract period which is for balance 1946

²⁹Tr. pp. 288-289; Pltf's. Exh. 31.

stop Also sale over such extended period should further reduce probable loss if any to nominal amount therefore we suggest we act as your agents to liquidate contract using our judgment as to manner of liquidation³⁰ having in mind reduction of loss to minimum or entirely stop If agreed please advise so we can inform contractors and open lettercredit thru Firstboston these calculations don't cover Whipl will you deal with him directly."

No one on defendant's behalf ever agreed to this "plan" of liquidation, or to any other plan³¹. The cable last quoted contemplated sales to third parties; not deliveries to defendant.

On July 12, 1946, Mr. Metcalf prepared an inter-office communication³².

"I talked to Messrs. Berger and Dichter regarding the Engrow glucose matter. I told Mr. Berger that we had retained Monsen & Freeman of New York to represent us in settling this matter and that Dr. Victor Goytia, 501 Avenida Roque, Saenz Pena, Buenos Aires, was the Argentina representative of Monsen & Freeman and that they were to get in touch with Dr. Goytia in relation to this matter.

"Berger told me that he was very well acquainted with Dr. Victor Goytia and that, as a matter of fact, he had done legal work for Engrow and was

³⁰Plaintiff on p. 43 of its brief purports to quote from this cable, but begins its quote with the word "Opening" and closes it with a period after "liquidation".

³¹Tr. pp. 648 to 649.

³²Tr. pp. 321-322; Pltf's. Exh. 38.

thoroughly familiar with the glucose situation so that he would not anticipate any difficulty in working this out with Dr. Goytia.”

On September 18, 1946, plaintiff wrote defendant:³³

“This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we bought for your Company have finally refused to accept cancellation of the contracts. We are, therefore, proceeding to sell the glucose at best prices obtainable and will, of course, look to you for payment to us of the difference between the prices thus obtained and the price at which you contracted to purchase the same.”

On September 20, 1946, defendant replied:³⁴

“Your letter of September eighteenth has been received and in reply we beg to advise that the statement in your letter that you bought glucose for our Company is incorrect and that, as you have been previously and repeatedly advised, we have no obligation to you in the matter.”

Nowhere in the record is there any evidence that any negotiations or any conversations ever took place after June 6, 1946, which contemplated acceptance by defendant or delivery to defendant of any of the glucose which was the subject matter of the alleged contract. The evidence is without conflict, and the court found, that the negotiations and correspondence were solely directed to a settlement of the dispute between the parties.

³³Tr. p. 316; Pltf's. Exh. 36.

³⁴Tr. p. 318; Pltf's. Exh. 37.

On the basis of this evidence the trial court found:³⁵

“7. That it is true that during the period June 6, 1946, to September 18, 1946, the parties negotiated for a settlement of any liability which might have existed on the part of defendant to plaintiff. Defendant did not actively or continuously or otherwise negotiate with plaintiff during said period or at any other time for the completion or restoration of said contract or deliveries thereunder but at all times maintained its claim that no contract existed between it and plaintiff and at all times definitely refused to accept any deliveries under or pursuant to said contract. At no time did defendant encourage, induce, or otherwise cause or lead plaintiff to defer or postpone any action it might have taken for the disposal of said glucose. On September 18, 1946, in the City of New York, plaintiff made and delivered to defendant a notice in writing of its intention to resell said 1135 tons of glucose.”

(2) The rate of exchange.

Under Argentina law there was a “pegged” rate of exchange for pesos and dollars with respect to the sale by exportation of glucose. This “pegged” rate of exchange was different from the then current rate of exchange, but was a government regulation and did not increase the amount of pesos actually received by a seller of glucose.³⁶ The exchange rate for export glucose was fixed at 1 to 3.3582. The free

³⁵Tr. p. 65; Findings of Fact.

³⁶Tr. pp. 352 to 356.

rate of exchange at the date of the judgment was 1 to 4.85³⁷. Had this alleged agreement been performed, defendant would have purchased pesos from a *bank* through a letter of credit, and plaintiff would have received only the price in pesos stipulated in the contract.³⁸

(3) Market price.

Plaintiff pleaded in its amended complaint:³⁹

“That there was an actual market in the City of Buenos Aires, Argentina, for the purchase and sale of glucose made from pure, crystal clear corn syrup and testing between 43° and 45° Baume, both for internal consumption *and for exportation*, during the period from May 23, 1946, to May 7, 1947; that the market price for said glucose at and in the Buenos Aires market for the months, commencing with June, to and including the month of November 1946, was the sum of 60¢ per kilogram; that the market price for said glucose in said Buenos Aires market for deliveries during the month of December, 1946, was the sum of 57¢ per kilogram; that said market prices were for bulk glucose; that the cost of cooperage to place said glucose in kegs containing 660 pounds each and to deliver said glucose so packed free on board of the vessel in Buenos Aires during all of said period was the sum of 15 centavos per kilogram; that the total cost of said cooperage and delivery costs

³⁷Tr. p. 67.

³⁸See the four letters allegedly constituting or evidencing the contract.

³⁹Tr. pp. 22-23.

and charges for said 1135 tons of glucose during said period was the sum of \$50,696.79; that the total market price in said Buenos Aires market for said 1135 tons of glucose during said period, calculated at said respective market prices and reduced to American dollars at the contract exchange rate aforesaid of 3.3582 to the dollar was and is the sum of \$201,595.90; that the total cost of said glucose, cooperage and expense of placing said glucose on board ship in Buenos Aires was and is the sum of \$252,292.69.”

Mr. Berger, President of plaintiff, testified that the export market price was different from and bore no fixed relation to the domestic market price for glucose. He said:⁴⁰

“Q. (By Mr. Bronson). Now the domestic bulk market was not the same as the export market, that is correct?

A. No. That is correct.

Q. And there is quite a substantial difference is there not?

A. That is right.

Q. And that is explainable, is it not, Mr. Berger, by the fact that you have a pegged price in exchange, that is, a pegged exchange on glucose that goes into foreign trade?

A. No. Your explanation isn't correct for that. *The pegged exchange rate has absolutely nothing to do with the price of glucose*, either for export or otherwise. The difference between the price of glucose for export and the price of domestic glucose is this: Domestic glucose is priced

⁴⁰Tr. pp. 355-357.

much lower than the export price and *the Government permits a much higher price*, a much higher quotation for export glucose for any country, not just the United States, to offset the local prices at which local glucose is sold.

Q. Can you supply the court with any formula on the difference between the two, the domestic and the export prices?

A. I am not sure what you mean by formula?

Q. Well the percentage, the differential between the two prices, as a normal or an average matter.

A. That I could hardly do, because *that is done by the officials* and I have no way of knowing how they arrive at that.

Q. Well, does it differ as much as 50 per cent, that is, the domestic price from the export price?

Mr. L. B. Stanton. I would object to this line of examination, that Mr. Berger was not qualified as a market expert.

The Court. Well, he can answer. He can answer. You may answer, if you can. If not, he may say so.

The Witness. I am delaying only because I am trying to remember what might have been the case.

I am afraid I don't feel qualified to answer the question of differences, because they are not our figures. We are interested only in the export glucose.

Q. (By Mr. Bronson). When you are interested in export glucose, Mr. Berger, and are purchasing for export glucose, *you are in competition with the market for local glucose*, are you not?

A. *I would say not* in so far as an organization such as ours is concerned. The suppliers who made a specialty of that type of business would possibly be.

Q. Well, what you want to tell me is that I will have to content myself with the statement that *there is a great difference between the domestic glucose market and the export glucose market and that you can't go further and give us some figure or fraction representing that great difference in the two prices?* Do I understand you correctly?

A. That is correct."

Further, although plaintiff pleaded a domestic market price *throughout* the period of deliveries of from 57 to 60 centavos per kilo,⁴¹ Mr. Berger testified that the *export* market price in August, 1946, was 1.23 to 1.25 pesos per kilo.⁴² There was, therefore, a very substantial, arbitrary difference in the domestic and export market prices in August.

Plaintiff did not establish and the record does not show any *export* market prices for the periods involved in the alleged contract. All of the testimony relates to the domestic market prices at Buenos Aires, that is, the prices which *plaintiff* could have *purchased* glucose at Buenos Aires, Argentina, on the dates involved, and which glucose would not be in a condition for exportation.

⁴¹Tr. p. 22.

⁴²Tr. pp. 353 to 354.

(4) Glucose was subject to "futures" contracts.

The subject matter of the alleged contract, glucose, was dealt in Buenos Aires on a "futures" basis, that is, it was bought and sold for delivery at a future date and at a time when it was not in existence. Such was the case in the alleged contract here involved. The various references in the testimony and in plaintiff's brief to speculation is based upon this dealing in futures; the letter from plaintiff to Whipple dated June 3, 1946, at page 204 of the Transcript refers to a possible present sale to defendant of the whole 1947 production; and a letter of April 3, 1946, from plaintiff to Whipple, at page 197 of the Transcript also deals in a "futures" contract.

IV.

ARGUMENT.

A. MEASURE OF DAMAGES.

The measure of damages generally applicable to sales contracts is the difference between the market price and the contract price. The market price involved is that at which the seller could sell; not the price at which he could buy. This is obvious because the object of the rule is to make the seller whole. If, as is ordinarily the case, the seller has the goods on hand, he may sell them at the current price and recover the difference between it and the contract price from the buyer. In this manner, he secures the full benefit of the contract for he receives the purchase

price. The cost to him of acquiring the goods is immaterial.

Plaintiff's argument asserts the foregoing rule, but *assumes* that the market price involved in the above measure of damages is the market price at which *it* could have *purchased* the glucose. This erroneous assumption goes to the heart of, and is fatal to, plaintiff's position.

Plaintiff states that it could have purchased each month's glucose from the *domestic* Argentine market on each month in which a delivery was due; that it would then have spent so much per kilo for cooperage, etc. to prepare and deliver it for export; that its damage, therefore, is the difference between the total of the above items and the total contract price. Such difference amounts to a computation of profits, and not an application of the statutory measure of damages, which statutory measure plaintiff insists here be applied.

On this record plaintiff cannot properly apply, or argue for the application of, the statutory measure of damage (difference between the market and contract prices). This is so not because the measure is or is not the proper one, but because there is *no evidence* of market price. The market price involved in this contract is an *export* market price; not a domestic market price. Necessarily the export price—or the price at which plaintiff could sell—is higher than the price at which he could purchase on the domestic market. It was so in this very case. Indeed,

if this were not the fact, it would be engaged in a charitable business for there would be no profits incident thereto. That the export market price was different from the domestic market price is clearly established in plaintiff's own case. Mr. Berger specifically so testified, and his testimony is set forth at length above at pages 16-18.

Mr. Berger not only testified that there was a difference in the two market prices and that they bore no fixed relationship to each other but he also exemplified such difference. In its complaint plaintiff pleaded a market price at Buenos Aires over the period of the delivery schedule of from 57 to 60 centavos per kilogram.⁴³ Mr. Berger, however, testified that the *export* price during the month of August was from 1.23 to 1.25 pesos per kilo.⁴⁴

Under the settled law of the State of California these facts require proof of the *export* market price in order to apply the proper measure of damages, or to recover *any* damages.

In *Boston Iron & Metal Co. v. Rosenthal*, 68 Cal. App. (2d) 564, 156 P. (2d) 963, the Court said (pp. 572-573):

“In the first place the record shows that the price of scrap in this market for export was from \$1.50 to \$2.50 a ton higher than the domestic price. The witness Gruenebaum, called by Rosenthal, testified that the domestic price was in the neighborhood of \$11 per ton and the export price

⁴³Tr. p. 22.

⁴⁴Tr. pp. 353 to 354.

\$1.50 or \$2.00 higher, in July, 1937. This testimony alone would suffice to support the finding. Rosenthal himself when questioned with respect to the reasonable market value as of July 12th and a reasonable period thereafter answered: 'The market value local mills was around \$11.50 a ton. * * * Q. And what is the export price on the same? A. Always \$1.50 to \$2.50, depending on how bad they want it—it always ranges from \$1.50 to \$2.50 a ton more than the local price.' It is true that Rosenthal later testified to \$12.50 a ton, as the export price, but the weight and persuasiveness of such testimony were questions for the trial court. After the case was reopened the court remarked that his recollection was that there had been other testimony as to value, to which Rosenthal's counsel responded: 'Mr. Gruenbaum testified the reasonable market value was \$13.50 and Mr. Rosenthal \$12.50.' From a reading of the record it would seem that at the opening of the second hearing Rosenthal testified to \$11.50 to \$12.50 plus \$1.50 to \$2.50 a ton more, which would bring the export price up to a range of from \$13 to \$15. This would appear to be so, for the court was careful to inquire 'that is \$12.50 a ton plus what, did you say? A. \$1.50 to \$2.50. Mr. Hollander: Q. What would that differential be for, was that export? A. Yes. * * * Q. In other words, that would be the naked price in San Francisco? A. 'That is right.' Later, undoubtedly referring to this testimony, the court remarked that Rosenthal had 'increased it from \$13 to \$15 a ton this morning'. Later on Rosenthal was questioned as to the *net* 'reasonable market value' and he an-

swered \$10 and \$10.50 a ton. He was not asked, nor did he say, whether this was the domestic or the export price but he certainly must have meant domestic in view of his earlier testimony. In addition to this testimony there is documentary evidence showing that during August (which was within the contract's time range for performance) Rosenthal sold on the 9th, 82.64 gross tons at \$14.40 net per ton, on the 11th, 297.71 at \$13.46 net and on the 18th, 420.76 at \$13.46 net and that on September 30, which was a month beyond the time range for performance he sold 578.54 gross tons at \$13.10. On July 26, 14 days after the cancellation, Rosenthal wrote Boston 'Besides this 1500 tons of Rail, I have about 1500 tons of ship scrap and railroad scrap. The local mills are paying \$12.50 per ton for scrap today, but I am going to hold on to this scrap for a little while and wait for a better market.' Local mills of course meant *domestic market* and the export prices were higher, as we have seen. * * * With all this in the record we are satisfied that there was abundant evidence to support the court's finding that the market value was \$13 a ton at the time of the breach and within a reasonable time thereafter."

As stated above, the facts relied upon by plaintiff in arguing for the application of the statutory measure do not support its argument, for they do not show the market price; rather, they tend only to show its cost of performance.

While the evidence is all to the effect that there *was* an export market price for the periods involved, the

record fails to disclose *what that export market price was* on the months involved.

An illustration of this situation is found in *S. P. Mill Co. v. Billiwhack Stock Farm, Ltd.*, 50 C.A. (2d) 79, 122 P. (2d) 650, where the plaintiff sought to recover judgment upon the identical theory of damages as plaintiff urges in this case. Plaintiff there took the *cost* of the goods to it, added transportation and processing charges and claimed that the result was the market or current price. The case was reversed upon appeal on the ground that plaintiff had not shown any market value which could be used in computing the proper measure of damages. The Court said (p. 88):

“What the statute calls for is ‘the market or current price.’ ‘Market price’ and ‘market value,’ when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business. * * * ‘Market value’ is the price at which goods are freely offered in the market *to all the world.*’ (*Kings Co. Packing Co. v. Sunland Sales Coop. Ass’n.* (1929), 100 Cal. App. 126, 133 [279 Pac. 1036]—emphasis by the court.) The evidence quoted does not show that there was an available market, or that there was a current or market price for rolled barley at the time and place of the breach. In the absence of all these factors, section 1784 Civil Code provides other rules for estimating damages, but there is no evidence by which they can be applied.”

It is clear, therefore, that the trial Court in applying the statutory measure of damages, correctly held

that “market price” as applied to this case means the price at which plaintiff could have *sold*, for *export*, and that its cost of performance was irrelevant.

There can also be no doubt of the fact that the evidence supports the trial Court’s finding that the export market price on June 6, 1946, was 1.35 pesos per kilo. The evidence was to the effect, and the Court found, that there was no fixed or continuing relationship between the domestic and the export market prices. As stated above, Mr. Berger so testified. Plaintiff did produce evidence to the effect that the market price for domestic glucose in Buenos Aires during the month of June was 1.20 pesos per kilo.⁴⁵ Plaintiff’s witnesses also testified that such domestic glucose could be processed for export for an additional cost of 15 centavos per kilo during the month of June. On the basis of this record the trial Court was entitled to find that while there was no constant relationship between the domestic and export prices nevertheless on June 6th the export price was 1.35 pesos per kilo.

See,

Lineman v. Schmidt, 32 Cal. (2d) 204, at p. 213, 195 P. (2d) 408.

In any event, plaintiff cannot complain of a finding based upon his own failure of proof. If any error resulted from the computation of the export market price, it was an error directly traceable to plaintiff’s failure to make out a case for damages in any other amount. In order to urge this objection it is necessary

⁴⁵Tr. pp. 494, 516, 527, 536, 541.

for plaintiff to point to evidence in the record which, under the law, the trial Court could or was bound to use in applying legal principles. There is no such evidence, and no proper computation of damages could be made by the trial Court other than the basis upon which it was made.

The foregoing discussion relates to the measure of damages as such, without regard to the date as of which damages should be fixed.

We will now show that the trial Court correctly selected June 6, 1946, as the date for fixing damages, for any one of three independent reasons:

(1) Plaintiff was under a duty to minimize damages;

(2) Damages for the breach of a contract to purchase future goods are determined as of the date of the breach; or

(3) Where a seller elects to treat an anticipatory repudiation as a breach and terminates the contract, damages are fixed as of such date of termination.

We will discuss these points in the order set forth.

B. DUTY TO MINIMIZE DAMAGES.

On June 6, 1946, defendant repudiated the alleged agreement.⁴⁶ For the purposes of the point to be dis-

⁴⁶A repudiation, like a breach of contract, is effected unilaterally although plaintiff seems to argue the contrary on pages 26 et seq. of its brief. See *Renner Co. v. McNeff Bros.*, 6 Cir., 102 F. (2d) 664, 666.

cussed in this section, it is immaterial whether plaintiff acquiesced in the repudiation or whether it decided to treat the contract as continuing in existence.⁴⁷

The law is settled that a party to a breach of contract is under a duty to minimize his loss in so far as it is practicable for him to do so. This duty is a part of the law of damages. It does not itself constitute the measure of damages but the extent to which damages can and should be minimized must be deducted from the total amount which might otherwise have been recovered. The rule requiring minimization of damages is unaffected by the provisions of the Uniform Sales Act.

See,

Crane Iron Works v. Cox & Sons Co., 3 Cir., 28
F. (2d) 328;

8 *Cal. Jur.* 785;

Vitagraph, Inc. v. Liberty Theatres Co., 197
Cal. 694, 242 P. 709.

The authorities relied upon by plaintiff in support of its argument that the Court erred in selecting June 6, 1946, as the date for the determination of damages are not in point. While it is true that these cases involved installment contracts, the question of mitigation of damages was not involved in them.

For example, in *United States v. Burton Coal Co.*, 273 U.S. 337, 47 S. Ct. 351, 71 L. Ed. 670, the case

⁴⁷The trial Court, as we will show later, found that plaintiff acquiesced in the repudiation, and such finding is necessarily the result of the evidence concerning the activities and correspondence of the parties immediately following June 6th.

upon which plaintiff places primary reliance, damages were based upon the difference between the contract price and the market price on each of the delivery dates. However, no question of mitigation was involved.

On the other hand, in *Crane Iron Works v. Cox & Sons Co.*, 3 Cir., 28 F. (2d) 328, the question of mitigation was involved and the Court held that the *Burton* case was distinguished on this ground, and ordered damages computed as of the date of repudiation.

In the *Crane* case, the plaintiff agreed to sell pig iron to defendant, deliverable in installments over the first half of 1921. On November 16, 1920, the buyer repudiated the contract. The price of pig iron had dropped sharply from the time of making the contract to June, 1921, the time when the contract was to have been fully performed. The case was tried before a jury which was instructed that the measure of damages was the difference between the contract price and the market price at the time of performance "unless you should find that there was something that the Crane Iron Works might have done to lessen or minimize the damages." The jury returned a verdict of \$1200.00 and plaintiff appealed, claiming it was error to admit the testimony of market value as of the date of the breach and to instruct the jury as above set forth because the measure of damages was fixed by the Uniform Sales Act. Plaintiff argued that the only relevant testimony as to market price was the market price for the months of January, February, March, April, May and June of 1921, the dates when the iron was to have been delivered. Plaintiff there,

as does the plaintiff in the instant case, relied upon the *Burton* case, claiming that it “sets at rest any question as to the measure of damages.” Defendant, however, claimed that when it cancelled the contract on a falling market, it was the duty of the plaintiff to use reasonable diligence to mitigate its damages, and if it had done so the damages it suffered would not have been in excess of those found by the jury. The Circuit Court affirmed the judgment stating (p. 330):

“The ultimate question before us, therefore, is whether or not the Uniform Sales of Goods Act of New Jersey abrogates the rule of law requiring the injured party on breach of a contract to use reasonable diligence in mitigating his damages.

* * * At the argument counsel for plaintiff admitted that *the Uniform Sales of Goods Act does not repeal this rule of law. It is still the duty of an injured party to use due diligence to mitigate his damages on the breach of the contract.* * * *

Was the plaintiff required to use due diligence to mitigate its damages in this case? The price of pig iron was constantly falling, with no prospect or indication of a rising market. The plaintiff knew, from the contents of the defendant’s letters that it persisted in its determination not to perform the contract and had definitely canceled it * * *

We think that the question of the mitigation of damages under the facts in this case was for the jury, and there was evidence to justify its conclusion. *The question of the mitigation of damages was not raised, and so was not before the court in the case of U. S. v. Burton Coal Co., supra.* It has no bearing upon the question upon

which this case depends. It merely restates the law as declared in the New Jersey Sales of Goods Act.”

In *Goldsmith v. Stiglitz*, 228 Mich. 255, 200 N.W. 252, the Appellate Court, in reversing a judgment, held that the trial Court erred in measuring damages as of the last day for delivery, where the fact showed that the seller after repudiation held the goods on a falling market. The Court said:

“Plaintiff was bound to minimize his loss. This is settled law * * * the market was falling, and this fact was well known to the plaintiff. It was his duty to do what he could to save the loss.”

In *Samuels v. E. F. Drew & Co.* (D.C., S.D., N.Y.), 286 Fed. 278, plaintiff sued for damages upon an anticipatory breach of a contract for the sale of goods deliverable in installments. The breach occurred when a receiver of defendant's assets was appointed, at a time prior to the delivery dates. The Court said (page 279):

“The real question is that of the measure of damages for the anticipatory breach. The receivers contend that the difference on October 30th between the contract and market price for delivery on the dates fixed by the contract governs. *Claimants assert that the difference between the contract and market price on the dates fixed for delivery controls.* The parties are agreed that the appointment of the receivers created anticipatory breach of contract, conditional, as receivers contend, on their failure to adopt the contracts, and,

as claimants contend, on their renunciation, in each case, within a reasonable time.

Ordinarily, in a personal action for breach of contract of sale, the measure of damages is as claimant contends; but even in such an action, if, on the anticipatory breach, there be a present market price for the goods to be delivered in accordance with the original contract, that price controls, not the market price for immediate delivery either at the time of breach or at the time fixed in the contract for delivery. A ready illustration is a wheat contract, made in December for May delivery, with anticipatory breach in January. The better rule of damages, because of the duty to mitigate damages when reasonably possible, is the difference between the contract price on the one hand, and the market price in January of May wheat, not the price of January cash wheat or of May cash wheat, on the other hand, and this even though action be brought or tried after May. Sedgwick, Damages (9th Ed.) § 636-E."

The preceding case was affirmed on appeal (*Samuels v. E. F. Drew & Co.*, 2 Cir, 292 F. 734) the Appellate Court saying (page 738):

“The law seeks to give to the injured person the value of the contract of which he has been deprived, no more and no less, and the question here is: What was that contract right worth on October 30, 1920? And the answer is that such sum is to be determined by taking the difference between the contract and market prices on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at

the time and place specified in the contract. *Roehm v. Horst*, 178 U.S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. When it is established that on the date of the breach the claimant could have entered into similar contracts for similar deliveries, the only damages to which he is entitled are represented by the difference between the contract price and the price at which he could have secured such contracts. This rule does not apply solely to commodities which are subject to systematic dealing in futures, and which have market quotations respecting deliveries on specific future dates, as contended for by the appellant. In the *Horst Case*, cited, hops were held to be a standard commodity. Coconut oil is no less a standard commodity. The rule is applicable, not only to commodities dealt in on the exchange where futures are bought and sold, but extends to all standard commodities having a market for future deliveries. The appellant substantially admits that contracts are frequently made for the sale of coconut oil for future delivery. This was the case here. The appellant admits it deals in the sale of coconut oil by contracting for future deliveries.

* * * There is a presumption that the receiver will not adopt a contract. If he does, it is a voluntary act of his own, to be performed with promptness; but, if he formally rejects such executory contract, the rejection dates back to the date of breach occasioned by the receiver's appointment. *In such cases there is need for mitigation of damages*, which is more striking than in the ordinary case. If the claimant elected to treat the contract as at an end, he should act

promptly; if he so desires, he may keep the contract open until the date of performance and then sue. He would be barred from proving a claim against the estate, inasmuch as the theory of allowing the proof of claims for breach of executory contracts against an insolvent estate necessarily presupposes that the contract has been broken by reason of the appointment of the receiver and cannot be kept open at the election of a claimant. *An executory contract claimant is entitled as damages only to the difference between the contract and the market value on the date of the breach of similar commodities for similar deliveries.* Pennsylvania Steel Co. v. N. Y. City Railway Co., 198 Fed. 721, 117 C.C.A. 503."

See, also,

Central Lumber Co. v. Arkansas Valley Lumber, 86 Kan. 131, 119 P. 321;

Fruit Growers Express Co. v. Citizens Ice and Fuel Co., 271 Ky. 330, 112 S.D. (2d) 54;

Chozo Yano v. Ledman, 188 N.Y.S. 764;

Sheldon v. Argos Mercantile Corp., 183 N.Y.S. 513;

Cron & Dehn v. Chelan Packing Co., 158 Wash. 167, 290 P. 999.

The above discussion also states the law of England.

See:

Roth & Co. v. Taysen, 73 L.T.R. 628.

It is also established that if, in attempting to mitigate damages, the plaintiff seller were to sell at the time of repudiation and the market thereafter rose, the fact that the market did rise would not affect his

right to such damages as would make him whole. That is, the right to recover for the difference between the contract price and the price at which he sold; the price on the date of repudiation.

See,

Restatement of Contracts, § 336(2);

Lamsas Flour Mills Co. v. Brandt, 98 Kans. 587, 158 P. 1120;

Dolfin v. Bruesselbach, 111 Colo. 525, 143 P. (2d) 1014;

Tillis v. Western Fruit Growers, Inc., 44 Cal. App. (2d) 826, 113 P. (2d) 267;

Boyles v. Kingsbaker Bros. Co., 5 Cal. (2d) 68, 53 P. (2d) 141;

22 *Cal. Jur. Sec.* 121.

The cases relied upon by plaintiff do not reach the point above made, and like the *Burton* case, are all distinguishable on the ground that the issue of mitigation was not involved.

We turn now to the evidence which compelled the trial Court to find that plaintiff was bound to sell the glucose on June 6th, or immediately thereafter in order to mitigate its damages.

It is agreed between the parties that the record supports the conclusion that the market for glucose was highly speculative. On page 60 of its opening brief plaintiff states:

“The price from the two manufacturers remains fairly constant throughout the year 1946 at 60 centavos. The market had steadily risen from 78 centavos per kilogram in January, 1946, up to

1.05 pesos in April; and during May, advanced from 1.10 to 1.20. During May *it fluctuated quite rapidly*. The cause of this rise in fluctuation was that glucose was in the hands of *speculative middlemen*. Thereby, the rise in price and fluctuation was caused; it was especially violent, in that the brokers and dealers in glucose were only about 20 in number.”

At page 21 of its brief, plaintiff states:

“The market was known to be highly speculative, and the new Peron government was just assuming control.”

Further, plaintiff’s witness Mr. Lakotas testified that at the end of May 1946 (Tr. pp. 555, 556):

“as the trade was waiting for regulation of exports by the new Peron government, dedicated at that moment to a campaign for reduction of the cost of subsistence, and there were no new export permits forthcoming although permits for sales up to the end of May had been conceded and these were exported accordingly.”

Numerous exhibits establish the turbulent condition of the glucose market. See, for example, plaintiff’s cable to Whipple dated May 20, 1946, stating:⁴⁸

“You cannot delay twelve days and expect same price *market fluctuating seriously* immediate answer required if interested * * *”

Under these circumstances the trial Court was fully justified in concluding that a reasonable man would not, and plaintiff should not be permitted to, specu-

⁴⁸Tr. p. 208; Pltf’s. Exh. 20.

late on the future of such a market at the risk of the defendant buyer; that on the contrary he must be held to have disposed of the goods with the certain knowledge that the benefit of his bargain would be secured to him under the law permitting him to recover from the defendant the difference between the price at which he sold and the contract price. This is fully in accord with the California law, which in Section 3358 of the Civil Code provides, in effect, that one may not realize a profit as a result of a breach of contract.

On pages 21 and 22 of its brief, plaintiff states:

“Appellant did not have on hand in June, nor was it required to have on hand the 1135 tons of glucose. Therefore, it was physically impossible for it to throw that quantity upon the market for sale in June.”

The fact is that when plaintiff sold to defendant, the goods were not “on hand.” They were not even in existence. Further, plaintiff was desirous of selling to defendant the whole of the production for the year 1947 which likewise was not “on hand.”⁴⁹ Yet these goods were being sold and were being traded in the domestic and export markets at Buenos Aires, Argentina. The record shows quite conclusively that there was a market in futures for glucose in Buenos Aires for exportation, and there was a market for the commitments which plaintiff had from his suppliers.

This argument contrasts rather sharply also with the allegations of plaintiff’s amended complaint

⁴⁹Tr. p. 204; Pltf’s. Exh. 19.

wherein it is alleged that between September 18, 1946, and April, 1947, it “assiduously endeavored to resell” said glucose, and that “on or about the 9th day of April, 1947, said plaintiff *sold and disposed* of the whole of said 1135 tons of glucose”,⁵⁰ and that “*plaintiff purchased* on the Buenos Aires, Argentina, market said 1135 tons of glucose”.⁵¹

We conclude, therefore, that the Court’s finding that there was a market for these goods on June 6, 1946, is fully supported by the evidence adduced in plaintiff’s own case. Further, the Court’s finding that plaintiff, acting as a reasonable person, should have disposed of the goods in June, 1946, rather than speculate at the expense of a responsible purchaser, was also compelled by the evidence presented to the trial Court.

Plaintiff complains that June 6, 1946, under any theory, is the wrong date to select for fixing damages, and challenges Mr. Woolsey’s authority to repudiate, etc. In this connection, the only evidence before the trial Court upon which its finding of market price as of June 6, 1946, could be based is to the effect that such prices obtained throughout the whole of the month of June, 1946. (See Brief for Appellant, p. 57.) Therefore, the trial Court’s finding would necessarily be the same for any given date in June, 1946.

The fact situation presented in this case is not a common one before the courts. The reason is very

⁵⁰Tr. pp. 24 and 25.

⁵¹Tr. p. 21.

well stated in a recent law review article (47 Mich. Law Rev. 538, at p. 545 (1949) :

“The paucity of cases bearing directly on this matter might be said to indicate that the problem is largely academic. It is suggested, however, that the explanation can be found in the fact that most business people are reasonable men interested primarily in production and the continuity of commercial activity; and when faced with an anticipatory breach, they have instinctively taken steps to mitigate. This is borne out by the fact that in most of the cases plaintiff has actually proceeded, and the only question is the reasonableness of his action.”

On page 52 of its brief, plaintiff anticipates our argument based upon mitigation of damages, and argues that we may not urge this theory because it was not pleaded as an affirmative defense. Plaintiff's point is not well taken. Pleading in the federal courts is governed by federal law. (See Rule 8, Federal Rules of Civil Procedure.) The federal cases, as well as those in almost all states, hold that mitigation of damages need not be affirmatively pleaded.

Canton-Hughes Pump Co. v. Llera, 123 C.C.A. 397, 205 F. 209, 215;

United States v. Homestake Mining Co., 54 C.C.A. 303, 117 F. 481, 490.

The cases cited by plaintiff on this point do not hold that the defense must be pleaded. They do hold that the burden of establishing a failure to mitigate is upon defendant. Assuming that such burden is a substantive matter controlled by California law, the

record fully supports the trial Court's finding that such burden has been met.

C. DAMAGES FOR THE BREACH OF A CONTRACT TO PURCHASE FUTURE COMMODITIES ARE FIXED AS OF THE DATE OF THE BREACH.

It is settled that where a contract is one for the purchase of "futures", an anticipatory repudiation fixes the date as of which damages are to be computed. The reason for this rule is that contracts calling for the purchase and sale of future commodities have a present value which should be taken as the proper basis for determining damages.

Renner Co. v. McNeff Bros., 6 Cir., 102 F. (2d) 664, cert. den., 60 S.Ct. 92, 308 U.S. 576, 84 L. Ed. 983;

Samuels v. E. F. Drew & Co., 2 Cir., 292 F. 734;
Cron & Dehn v. Chelan Packing Co., 158 Wash. 167, 290 Pac. 999.

In the *Renner* case the defendant buyer repudiated an executory contract calling for the sale and delivery of hops in installments. The Court stated (p. 666):

"The principal question is whether the evidence as to the amount of appellee's damage is sufficient to support the finding of the District Court. The decision of this question in turn depends upon whether the correct measure of damages was applied.

Appellant contends that the correct measure of damages is the difference between the contract

price and market price as of the times when the deliveries were to have been made under the contracts. This is the rule laid down in *United States v. Burton Coal Co.*, 273 U.S. 337, 47 S. Ct. 351, 71 L. Ed. 670. No evidence was given of such prices, and if this rule is applied the judgment must be reversed. Appellee urges that under the rule of *Roehm v. Horst*, *supra*, where, as here, the commodity was bought and sold for future delivery, the correct measure of damages is the difference between the contract price and the market price of the hops in July, 1935, the time for repudiation, for delivery at the times called for in the contracts.

* * * * *

We see no reason to depart from the rule announced in *Roehm v. Horst*, *supra*. That case, on its facts, is almost identical with the instant case so far as the present question is concerned. It involved a series of contracts covering the furnishing of a specified number of bales of hops at different times during the period of five years, which period had not expired when the breach occurred, and when the action was instituted. It is a custom of long standing among hop dealers to do business by way of future contracts, and this custom was adhered to in the *Roehm* case, as in the present case. The court there applied the rule that 'plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself,' and declared at page 2120

S. Ct. at page 788, that 'plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.'

"Appellant contends that the decision in *United States v. Burton Coal Co.*, supra, in effect overrules that of *Roehm v. Horst*, supra. While it is subsequent, it does not refer to the *Roehm* case, and the facts present a substantial distinction.

* * * Where, as here, there is an established market for the purchase and sale of such contract rights, the value of such rights at the time of breach is evidence of damage at the time of breach. Cf. *Restatement of Contracts*, Section 338. comment b. This feature presents the distinction between the *Burton* and the *Roehm* cases, supra, and the *Roehm* decision fits the instant case precisely. Applying its rule, the amount of the verdict was correct."

In the *Samuels* case the defendant, who had agreed to purchase installment of cocoanut oil from plaintiff was placed in the hands of a receiver before the time that the goods were to be delivered. It was agreed that the appointment of the receiver constituted an anticipatory breach. Plaintiff sued for damages and the lower Court fixed damages as of the date of the anticipatory breach. Plaintiff appealed claiming as does plaintiff in the instant case that damages should be determined by taking the differences between the contract prices and the market prices on the dates fixed by the contract for the deliveries of the install-

ments. The Appellate Court in affirming stated (pp. 738-739):

“When it is established that on the date of the breach the claimant could have entered into similar contracts for similar deliveries, the only damages to which he is entitled are represented by the difference between the contract price and the price at which he could have secured such contracts. This rule does not apply solely to commodities which are subject to systematic dealing in futures, and which have market quotations respecting deliveries on specific future dates, as contended for by the appellant. In the Horst case, cited, hops were held to be a standard commodity. Cocoanut oil is no less a standard commodity. The rule is applicable, not only to commodities dealt in on the exchange where futures are bought and sold, but extend to all standard commodities having a market for future deliveries. The appellant substantially admits that contracts are frequently made for the sale of cocoanut oil for future delivery. This was the case here. The appellant admits it deals in the sale of cocoanut oil by contracting for future deliveries.”

The foregoing rule is not new to this Honorable Court. It referred to and adopted the rule in the recent case of *United States v. Harris*, 9 Cir., 100 F. (2d) 268, where in affirming an award of damages for the breach of a contract to sever and purchase lumber, the Court said (pp. 277-278):

“There is analogy between the situation here and cases involving contracts of sale of staple commodities for future delivery. *Roehm v. Horst*,

supra; Cron & Dehn v. Chelan Packing Co., 158 Wash. 167, 290 P. 999; Samuels v. E. F. Drew & Co., 2 Cir., 292 F. 734. In these cases it is held that an anticipatory breach effects a premature destruction of the contract, and that the injured party is entitled to compensation measured by the value of the contract at the time of its destruction. This value is to be determined 'by taking the difference between the contract and market prices on the date of the breach for the same quality of goods, not for immediate delivery, but for delivery at the time and place specified in the contract.' Samuels v. E. F. Drew & Co., supra, 292 F. 738."

Since it appears without conflict in the record that the instant contract involved the sale of future goods and the existence of a domestic and an export market for such future goods was established by plaintiff's own case, the above rule applies and the trial court on this ground also correctly fixed the damages as of the date of repudiation, namely: June 6, 1946.

D. PLAINTIFF ELECTED TO TREAT DEFENDANT'S REPUDIATION AS TERMINATION OF THE CONTRACT AND DAMAGES SHOULD BE COMPUTED AS OF THE DATE OF THE REPUDIATION.

Plaintiff argues that a seller need not treat a buyer's repudiation of the contract as an anticipatory breach. This is correct. A seller, in such a case (unless the contract involves future goods, and in the absence of any duty to mitigate damages), may treat

the contract as subsisting, await the time for performance, and if the buyer persists in his repudiation, recover damages measured by the difference between the contract price and the market value of the goods at the time when such goods ought to have been accepted. The reason for this rule is clear. The contract is not terminated by the buyer's repudiation, for one party cannot unilaterally destroy the binding force of a valid contract. If the seller elects to continue the contract in existence, in looking for the correct measure of damages it is, of course, logical and correct to resort to the delivery dates specified in the still existing contract.

However, the adoption of such election gives rise to a correlative right in the buyer: he may effectively withdraw the repudiation at any time prior to the date for performance, and upon withdrawal of such anticipatory repudiation there remains no cause of action even for nominal damages (*Williston on Contracts*, Sec. 1335). In other words, there is nothing equivocal about such election; the contract continues in existence and if, at the time of delivery the buyer accepts the goods, the seller cannot be heard to complain.

But the rule is different when the seller elects to adopt the repudiation of the contract by the buyer as a breach and acquiesces thereto. The effect of this election is succinctly stated in *Alderson v. Houston*, 154 Cal. 1 (96 Pac. 884), on page 12.

“Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the

parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages.”

To the same effect are

Atkinson v. District Bond Co., 5 Cal. App. 2d 738 at 743, 43 P. (2d) 867;
6 Cal. Juris. 460.

It is not necessary that plaintiff should indicate his election by bringing suit at once. He can show his election by his acts and conduct.

See,

Bu-Vi-Bar Petroleum Corp. v. Krow, 10 Cir. 40 F. (2d) 488.

Once the seller elects to treat the contract as terminated, of course withdrawal of the repudiation is no longer possible (*Williston, Contracts*, Sec. 1335).

The trial court has found that in this case, plaintiff acquiesced in the breach, and elected to treat the contract as terminated.⁵² This finding is fully supported by the evidence as we have shown above.⁵³

The contract, then was terminated on June 6, 1946. This termination was effective as to *defendant* (since it lost its right to withdraw the repudiation) as well as for plaintiff. Under these circumstances plaintiff appropriated the goods (or contract rights to secure them as future goods) to his own use, and thereafter

⁵²Finding No. 7, Tr. p. 65.

⁵³See pp. 7-14 of the Statement of Facts.

kept, sold or otherwise disposed of them for his own account and at his own risk or benefit.

The ultimate purpose of any measure of damages is to make the promisee whole and secure to him the benefit of his bargain. In situations such as the instant case, there is only one such measure that will operate justly in general application: damages should be measured as of the date of termination of the contract; the date upon which the seller elects to appropriate the goods to his own use and benefit.

A seller obtains the full benefit of his bargain if he gets as damages the difference between the contract price and the value of the goods at such date of termination. It should make no difference whether the seller resells the goods or not. Since title to the goods is in the seller and the contract is terminated, he can of course do with his goods anything he pleases. What counts is the value of the goods at the time of the termination, and such value is the market price at such time, regardless of whether the seller sells the goods or decides to keep them.

Turning now to the law, the rule is stated as follows in 15 *Am. Jur.* 448:

“Thus, where a repudiation of a contract prior to the time for performance is accepted by the other party as a breach, the damages are to be computed as of the date of the repudiation. But where he does not accept the anticipatory repudiation and treats the contract as in force until after the time for performance has passed, the damages are to be computed as of the time fixed for performance.”

In 46 *Am. Jur.* 752, it is said that "the prevailing view is that where the seller has elected to adopt the repudiation of the contract by the buyer as a breach thereof, and to bring action for the breach, the measure of damages is computed on the basis of the difference between the contract price and the market value of the goods or merchandise at the time of the repudiation." See also:

34 *A. L. R.*, 114, 115;

44 *A. L. R.*, 215, 242;

McNeff v. White Eagle Brewing Co., 294 Ill.

App. 37, 13 N.E. (2d) 493.

In *Rice v. Schmid*, 18 Cal. (2d) 383, 115 P. (2d) 498, plaintiff and defendant entered into an agreement for the sale by plaintiff of 6,000 barrels of flour, to be delivered in 90 days upon instructions by defendant. The contract was to be automatically extended if, on account of the fault of the buyer, not all of the flour was shipped within 90 days *unless plaintiff chose to terminate it* on that ground. Seventeen months after the date of the contract, the buyer refused to furnish instructions for the delivery of the remaining 3245 barrels and plaintiff notified the buyer of *his election to terminate* the contract and demanded damages. The Court held that "damages should be the difference between the contract price and the market price on the date of *final termination* of the contract." (18 Cal. (2d) at p. 388).

On a second appeal in the same case (*Rice v. Schmid*, 25 Cal. (2d) 259, 153 P. (2d) 313) the Court quoted and reaffirmed its holding that the *termination*

date was to be taken in fixing damages (25 Cal. (2d) at p. 262).

The case was tried and again appealed (*Lineman v. Schmid*, 32 Cal. (2d) 204, 195 P. (2d) 408). The Supreme Court reviewed its earlier decision, stating (p. 206):

“The first trial resulted in a judgment for the plaintiff in the sum of \$712.45 damages. That purported amount of the plaintiff’s loss on the undelivered flour was based on the market price of the flour on the date the contract was executed. The plaintiff appealed and the judgment was reversed. (*Rice v. Schmid*, 18 Cal. (2d) 382 [115 P. 2d 498, 138 A.L.R. 589]) on the ground that the correct measure of damages was the difference between the contract price and the market price for each brand of flour on December 2, 1938, *the date of termination* or breach of the contract. The trial court was directed to determine the amount of damages in accordance with the stated measure and enter judgment for the plaintiff for the amount so found.”

Although the facts in the *Rice v. Schmid* cases are in some respects different from those of the instant case, the Court specifically held that the “termination” date governed in fixing damages.

See, also, the numerous cases cited in 44 A.L.R. at p. 242, under the heading: “*Contract Price Less Value at Time Seller Acquiesces in Breach.*”

The situation involved in the instant case—that is, acquiescence to an anticipatory breach—must be distinguished from two different situations:

(1) Where the seller refuses to acquiesce in the breach but instead treats the contract as subsisting; and

(2) Where he continues to treat the contract as subsisting and is entitled to and does sell the goods as agent for the buyer, and then sues the buyer for the *purchase price* less the amount already received through resale for the buyer's account.

In the instant case, plaintiff acquiesced in the breach, and has sued for *damages*, not for the *purchase price*.

The cases cited by plaintiff are distinguishable for one or both of the above reasons.

If there should be any doubt as to the sufficiency of the evidence to establish plaintiff's acquiescence to the anticipatory breach on June 6, 1946, there certainly can be no doubt that he acquiesced thereto by his letter of September 18, 1946.

In this latter connection, plaintiff, on pages 13 and 14 of its brief, states that the evidence is uncontradicted that the market price was 60 centavos or less in September, 1946. Plaintiff is incorrect. The Court's finding of an export price in September, 1946 of 1.25 pesos per kilo⁵⁴ is fully supported by the evidence of plaintiff's own president⁵⁵ and it computed the *export* price here in the same manner as done for June, 1946.

⁵⁴Tr. p. 66.

⁵⁵Tr. pp. 369, 378; Deft's. Ex. Q.

E. THE CURRENT RATE OF EXCHANGE WAS PROPERLY
ADOPTED IN ASSESSING DAMAGES.

If plaintiff is entitled to damages at all, he is entitled only to that number of dollars which will purchase for him Argentine pesos to the extent of his loss.

Argentine law imposes a "pegged" rate of exchange in export sales of glucose. This rate is arbitrary and bears no relation to the free rate of exchange. The Argentine seller realizes no advantage from this law; the effect is merely that the American purchaser must spend more dollars to acquire the same number of pesos.

Plaintiff would have been compensated, under the alleged contract, by receiving from defendant 1.375 pesos per kilo. It is immaterial to plaintiff how many dollars defendant would have had to spend to buy that many pesos to give to plaintiff. There is, of course, no arbitrary, pegged rate applicable to the judgment herein. Plaintiff will purchase pesos at the free rate of exchange. It seems self-evident that plaintiff should receive only the number of dollars which will allow him to purchase only the number of pesos in which he has been held to be damaged. Plaintiff argues, on the other hand, that he should be given enough dollars to purchase *more* than the number of pesos in which he has been damaged.

Under section 3358 of the California Civil Code, plaintiff should not be allowed to succeed in his attempt.

See, in this connection:

The Saigon Maru (D.C., D. Ore.), 267 Fed. 881;

The Hurona (D.C., S.D. N.Y.), 268 Fed. 910;

Liberty Nat'l. Bank v. Burr (D.C., E.D. Ga.), 270 Fed. 251;

“*Money in the Law*”, Prof. Arthur Nessbaum, 1939 ed., p. 487;

16 *N.Y.L.Q.* 559;

25 *C. J. Sec.* 561.

Plaintiff also argues, alternatively, that the free rate of exchange at the date of the breach, rather than at the date of judgment, should be used in fixing the amount of dollars recoverable. This theory is subject to the same objection. At the date of the breach, plaintiff was damaged in a given amount of pesos. As far as it, in Argentina, is concerned, that number of pesos is the same on June 6, 1946, or any subsequent date. There is no reason for permitting plaintiff to make a profit on the rate of exchange merely because he is permitted to sue in the United States. If its suit were brought in Argentina, he would receive his damages, if any, in the given amount of pesos, and without regard to the rate of exchange. He would realize no profit through the fluctuating free rate.

If plaintiff's argument has any validity in reason, it could more effectively be made with respect to domestic judgments. For example, the “value” of the American dollar, and its purchasing power, has declined substantially over the last several years. On the theory argued, a plaintiff in an action for breach

of a domestic contract could claim that he should receive more dollars in 1949 than he received because of a breach occurring several years earlier, in order to equalize the effect of the intervening inflation. Such an argument would actually be more logical than plaintiff's, but certainly would not be entertained by the Courts.

While it cannot be denied that there is conflict upon the point, the logic of the reasoning in *Tillman v. Russo Asiatic Bank*, 2 Cir., 51 F. (2d) 1023, cannot be refuted. The Court there said (p. 1025):

“Various defenses to each cause of action were raised, but the principal question was whether any proof was made of the value of the rubles in United States currency. Where a debt is due in a foreign country payable in the currency of that country, and suit is brought on it in the United States, the Supreme Court has held the plaintiff should recover what that currency is worth in this country on the day of judgment. Justice Holmes, who laid down the foregoing rule in *Deutsche Bank v. Humphrey*, 272 U.S. 517, 47 S. Ct. 166, 71 L. Ed. 383, said that the date of judgment, and not the date of the breach, was the proper time for figuring the rate of exchange because ‘a suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here.’ ”

We say, therefore, that the trial Court properly used the free rate of exchange on the date of the judgment in determining the damages.

F. COMPUTATION OF DAMAGES AND OTHER POINTS.

Plaintiff argues, as a basis for reversal, that the trial Court made a mathematical error of some \$17.51 in computing the judgment. Since this is a ministerial matter it would not appear to constitute reversible error. If it should become necessary, this Court has power to correct any such error, or order it corrected without any necessity for a retrial.

Plaintiff also attacks Mr. Woolsey's authority to make or communicate to plaintiff the repudiation of June 6, 1946. While there is evidence of his authority, the fact that both parties acted upon the repudiation, and that defendant ratified his action (assuming the necessity therefor) is too clear from the record to call for extended argument.

V.

CONCLUSION.

As stated above, defendant denies that plaintiff is entitled to damages in any amount, and in its own Appeal, seeks a review by this Honorable Court of the evidence upon which a contract was found by the trial Court to exist. This response to plaintiff's brief on appeal necessarily *assumed* the existence of a contract. Upon the basis of such assumption, we submit that the trial Court correctly determined the amount of damages on one or more of the three theories above set forth, and that it correctly refused to allow plaintiff a gratuitous profit in pesos by adopting a rate of ex-

change which bears no relation to the amount of plaintiff's damages.

Defendant submits that if this Honorable Court should find, contrary to defendant's contentions, that a contract existed between the parties, the judgment of the trial Court should be affirmed on the issue of damages.

Dated, San Francisco, California,
December 19, 1949.

Respectfully submitted,

BRONSON, BRONSON & MCKINNON,

EDGAR H. ROWE,

*Attorneys for Defendant and Appellee
Schenley Distillers Corporation.*

No. 12261.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A.,
a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

ANSWER TO OPENING BRIEF OF APPELLEE.

STANTON & STANTON,
740 South Broadway, Los Angeles 14,
Attorneys for Appellant.

MESIROV & LEONARDS,
1618-20 Packard Building,
Philadelphia, Pa.
Of Counsel.

FILED

JAN 6 - 1950

PAUL P. O'BRIEN,

CLERK

TOPICAL INDEX

PAGE

Introduction	1
--------------------	---

I.

The sales contract was written. By its terms, it was expressly made between appellant as vendor and appellee as vendee. By its terms, it was expressly made by the respective agents of the parties thereto, expressly acting as such agents. The terms of this written contract may not be varied by parol argument or evidence.....	3
A. Reexamination of the facts anent the respective agents through whom the parties acted is first required.....	3
B. The contract was made by its very terms between the parties to this action.....	7

II.

The two contracting corporations were each bound by the meeting of the minds of their respective contracting agents thereunto duly authorized.....	10
A. The knowledge of the respective contracting parties and their agents	10
B. The form of the contract may be oral or written.....	13
C. The ratification	16
D. The 400-ton oral contract.....	17
E. The letter of credit.....	17
F. The delivery to McCormick Steamship.....	18
G. The metric tonnage.....	19
H. The acceptance was complete.....	20
I. The decision of the trial court.....	25

III.

The contract composed of the four letters contains all of the terms agreed upon and no future negotiations were contemplated	27
A. The contract as evidenced by the letter was intended by each party to at once take effect as a complete contract....	27
B. The negotiating agents intended that the letters evidence a complete contract.....	28
C. The purchase order was by the negotiating agents never intended to be a part of the contract.....	30
D. A binding contract is effected when the parties have agreed upon all of the essential facts, notwithstanding the fact that a more formal instrument was later to be issued	31
E. The memorandum to satisfy the statute is sufficiently evidenced by the letters.....	34

IV.

Proof of illegality of the contract was wholly lacking. Ability to perform at the dates at which performance was required was proven	35
A. The pleading	35
B. The pleaded laws contained no prohibition on the export of glucose	39
C. The evidence	42
Conclusion	53

Appendices :

Appendix I. Exhibit A. Affidavit on admission under Rule 36	App. p. 1
Appendix II. Exhibit B. Legal notice.....	App. p. 4
Appendix III. "Important notice" printed on order....	App. p. 5

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Allan v. Guaranty, 176 Cal. 421, 168 Pac. 884.....	22
Allen v. Markham, 156 F. 2d 653.....	37
Bewick v. Mecham, 26 Cal. 2d 92, 156 P. 2d 757.....	46
Carl v. Eade, 81 Cal. App. 356, 253 Pac. 750.....	46
Church v. Wade, 80 Cal. App. 2d 412, 182 P. 2d 212.....	22, 32
Clarke v. Fiedler, 44 Cal. App. 2d 838, 113 P. 2d 275.....	
.....	15, 23, 33, 34
Columbia Pictures v. de Toth, 87 Cal. App. 2d 621, 197 P. 2d 580	32
Conner v. Plank, 25 Cal. App. 516, 144 Pac. 295.....	22
Coronet Phosphate Co. v. U. S. Shipping Co., 260 Fed. 846.....	37
Cowan v. Tremble, 111 Cal. App. 458, 296 Pac. 91.....	16
Dorn v. Goetz, 85 Cal. App. 2d 407, 193 P. 2d 121.....	50
Gaines, Estate of, 15 Cal. 2d 255, 100 P. 2d 1055.....	9
Hall v. Remp, 73 Cal. App. 2d 377, 166 P. 2d 372.....	10
Gibson v. La Salle Institute, 66 Cal. App. 2d 609, 152 P. 2d 774	15, 34
Graham, etc. Corp. v. Mt. View D. Corp., 37 Cal. App. 2d 315, 99 P. 2d 357.....	50
Harding v. Robinson, 175 Cal. 534, 166 Pac. 808.....	9
Harper v. Goldschmidt, 156 Cal. 245, 104 Pac. 451.....	16
Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830.....	8
Heffner v. Gross, 179 Cal. 738, 178 Pac. 860.....	9
Johnson v. 20th Century-Fox F. C., 82 Cal. App. 2d 796, 187 P. 2d 474.....	33
Kreling v. Walsh, 77 Cal. App. 2d 821, 176 P. 2d 965.....	23, 33
Liftov v. Hershman, 80 Cal. App. 2d 422, 182 P. 2d 222.....	10
Lloyd v. Murphy, 25 Cal. 2d 48, 153 P. 2d 47.....	51
Meyer v. Sullivan, 40 Cal. App. 723.....	19

Nolte v. So. Cal. H. B. Co., 28 Cal. App. 2d 532, 82 P. 2d 946	22, 33
Pacific States C. Co. v. Steiner, 192 Cal. 376, 220 Pac. 304.....	9
Pacific Venture C. v. Huey, 15 Cal. 2d 711, 104 P. 2d 641.....	46
Producers Fruit v. Goddard, 75 Cal. App. 737, 243 Pac. 686.....	22
Rottman v. Hevener, 54 Cal. App. 474, 202 Pac. 329.....	10
Shamlan v. Wells, 197 Cal. 716.....	12
Shapiro v. Equitable L. Ins., 76 Cal. App. 2d 75, 172 P. 2d 725	12
Tanner v. T. I. & T. Co., 20 Cal. 2d 814, 129 P. 2d 283.....	46
The Baja, California, 45 Fed. Supp. 519.....	38
Thompson v. Schurman, 65 Cal. App. 2d 432, 150 P. 2d 509....	
.....	24, 33
Toms v. Hellman, 115 Cal. App. 74.....	31
United States Trading Corp. v. Newmark, 56 Cal. App. 176, 205 Pac. 29.....	50
Valz v. First National Bank, 96 Ky. 543, 49 Am. St. Rep. 306....	38
Vanceil v. Kumle, 26 Cal. 2d 732, 160 P. 2d 802.....	12
Watson v. Sutro, 86 Cal. 500, 24 Pac. 172.....	12

STATUTES

Argentine Republic Laws :

No. 12,591	35
No. 15,591, Art. 14.....	35
No. 12,830	35
Civil Code, Sec. 1723	14, 34
Civil Code, Sec. 1724	15, 34
Civil Code, Sec. 1783.....	26
Civil Code, Sec. 2858.....	17

TEXTBOOKS

PAGE

59 Corpus Juris, Sec. 746, p. 1205.....	36
9 Corpus Juris Secundum, Sec. 176, p. 384.....	17
17 Corpus Juris Secundum, Sec. 43, p. 384.....	21
17 Corpus Juris Secundum, Sec. 49, p. 392.....	24
32 Corpus Juris Secundum, Sec. 851, p. 784.....	9
37 Corpus Juris Secundum, Sec. 174, p. 652.....	34
38 Corpus Juris Secundum, Sec. 7, p. 1142.....	17
Jones, Evidence (3rd Ed.), Sec. 434, p. 656.....	9
Restatement of Law of Agency, Sec. 272, p. 603.....	12
Restatement of Law of Contracts, Sec. 26.....	24
Restatement of Law of Contracts, Sec. 207.....	34
Restatement of Law of Contracts, Sec. 315.....	46

No. 12261.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A.,
a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

ANSWER TO OPENING BRIEF OF APPELLEE.

Introduction.

The clear statement of the pleadings and facts, as given in appellant's opening brief, disclosed the jurisdiction of the District Court and of the Court of Appeals. The specification of errors showed the erroneous views taken in the findings. A concise statement of the case and of the questions involved was simply stated. Upon this answer to the brief of appellee or defendant, as it desires to be called, reference is respectfully made to appellant's opening brief. Various inaccuracies contained in the brief of our opponent do not permit acceptance of its statements.

This brief, in answer to appellee's opening brief, naturally divides itself into four main heads, which, in themselves, comprise the argument of appellee. Con-

fusion, evident in appellee's brief, requires for orderly answer, a rearrangement and segregation into these four heads. Presentation of the "questions involved" in the brief of appellee clarifies the issues. A concise statement of these questions, when given in a proper and orderly approach, develop appellee's confusion.

I. May a written sales contract expressly made between two known principals be varied by argument or evidence so as to substitute instead of the principal therein designated as vendor the name of its agent expressly as such acting for said principal?

II. Is the meeting of the minds, essential to the formation of a sales contract, that which exists between the two duly authorized agents for the respective corporate principals, each of whom is acting within the scope of the respective authorities, or may reference be made to the state of mind of some other corporate agent not directly engaged in the negotiation?

III. When the original contract contains all of the terms agreed upon and no future negotiations are contemplated, does the mere fact that a subsequent formal document is later to be prepared by one of the parties affect the terms of the original contract?

IV. Does the burden of proof to establish illegality of a contract rest upon the party alleging that affirmative issue or is the party suing upon the contract required to establish the negative issue that there was no illegality?

The answer to appellee will, therefore, be made under the preceding four headings.

I.

The Sales Contract Was Written. By Its Terms, It Was Expressly Made Between Appellant as Vendor and Appellee as Vendee. By Its Terms, It Was Expressly Made by the Respective Agents of the Parties Thereto, Expressly Acting as Such Agents. The Terms of This Written Contract May Not Be Varied by Parol Argument or Evidence.

The parties to a contract are of primary consideration in any construction of its terms. This heading is logically placed first in order. It deals with the suggestion that Mr. Whipple, rather than appellant, was the principal in the contract, which appears in the brief of appellee extending from page 24 to page 36. Necessarily portions of the evidence and views thereon extending from page 24 to page 36 are affected by the argument and citations under this heading in so far as the terms of the contract are concerned.

A. Reexamination of the Facts Anent the Respective Agents Through Whom the Parties Acted Is First Required.

1. *The Agency of J. B. Donnelly, for appellee.*

The prime defense of appellee in actions such as this apparently is lack of authority of its agents. This lack of authority was pleaded in its answer [R. 50]. The screen of privilege of counsel, by other agents, was noted in appellant's opening brief. Pressure under the discovery rules resulted in the stipulation as to the full authority of Mr. Donnelly [R. 126; Ex. 6] to negotiate and enter into, on behalf of appellee, the contract in the case at bar and to make and consummate said contract.

2. *The Agency of Harold A. Whipple, for appellant.*

For upwards of twenty years, Mr. Whipple had operated in Los Angeles as an import and export broker [R. 105]. He had known appellant since 1945. Commencing with a personal interview between Messrs. Berger and Whipple in 1945, the two had looked forward [R. 222] to the development of a relationship dealing with an import and export trade to and from Argentina and the United States. The operation was intended to be flexible, in accordance with situations as they arose. According to Mr. Whipple's testimony [R. 195] the method which he urged was that he act as the agent of appellee; overages which he might obtain between the cost to appellant and the sale price to the American purchaser would be subject to participation by each party on some agreed basis. This basis was undetermined at the date of the contract in the case at bar. Never was there a thought that Mr. Whipple would contribute capital or buy or sell on his own account.

Always he was to act exclusively as agent.

The letter of April 3, 1946 [R. 197; Ex. 18] refers to preceding correspondence of date March 20th and 27th. Development of the glucose trade was therein instituted wherein it was contemplated that appellant would buy the glucose and sell to the consumer principal obtained by Mr. Whipple. Payment would be made by the consumer's Letter of Credit to appellant in Buenos Aires. A tentative arrangement was outlined of 1% of cost to appellant and a reservation by Mr. Whipple from his commission of

some equitable portion to be paid to appellant as the circumstances in the particular case would develop. Mr. Whipple, under the plan, on each occasion, would inform appellant of "the name of the purchaser and the quantity needed" so that appellant could accept or reject the proposed contract.

Appellee always was informed and always knew that Mr. Whipple was negotiating for an Argentinian principal and in no respect acting as principal himself. On May 14, 1946 [R. 107], Mr. Whipple informed Mr. Donnelly that "a short time previously my principals in Buenos Aires had available 1300 tons." On May 20th, Mr. Baglin requested Mr. Whipple to cable his principals [R. 110] to ascertain if the 1300 tons was available. In his letter of May 20th [R. 113; Ex. 2], Mr. Baglin stated that appellee "would like the opportunity of purchasing this quantity (300 tons) in addition to the 1000 tons" and, acknowledging the agency of Mr. Whipple, stated "It is understood that we will be purchasing by letter of credit direct from the Argentine shipper." In his letter of May 21st [R. 117; Ex. 3], Mr. Whipple informed appellee that "you can arrange your credit to Cia Engraw."

Contrary to the statement made in appellee's brief (pp. 56 and 57), Mr. Whipple, on May 21, 1946 [R. 161; Ex. C] informed appellant that appellee was the purchaser with whom he was negotiating. Cable expense traditionally involves brevity of expression. The reference which is made to Exhibit 33 by appellee is hardly permissible, in view of the fact that this exhibit is marked only for identifica-

tion. Its introduction into evidence was barred on the objection of appellee [R. 229-300].

Also contrary to the testimony is the statement in appellee's brief (p. 57) that "Whipple made his agreement with plaintiff for the sale of the glucose at 1.30 pesos" and "without advising plaintiff he negotiated with defendant for the sale at 1.375 pesos." The short answer is that Mr. Whipple, in all of his negotiations with appellee, was operating strictly in accordance with the original plan. His compensation as agent for appellant was authorized in the letter of April 3rd. The cable from appellant to Mr. Whipple, of May 21, 1946 [R. 160; Ex. B] was merely an instruction as to quantity available and price required in order that Mr. Whipple could appropriately re-price to the consumer. The evidence was that, on May 20th, Mr. Whipple received from Mr. Baglin a verbal commitment which Mr. Baglin stated he would confirm in writing. The actual confirmation was the rather loose offer from appellant of date May 20th [R. 112; Ex. 2]. It manifests the agency of Mr. Whipple and that the purchase was to be "direct from the Argentine shipper." Mr. Whipple's testimony, above reviewed, and the letter of April 3, 1946 [R. 197; Ex. 18] all showed that Mr. Whipple was fully authorized by appellant to conduct the negotiations in the very manner in which he did as agent for appellant.

On May 23, 1946, Mr. Whipple, by letter [R. 165; Ex. F] advised appellant of the terms of sale. Appellee doubtless has again overlooked this documentary evidence produced by itself on its examination

of Mr. Whipple, when it states in its brief (p. 58) that appellant was never advised. True, appellee claims the May 23rd letter, mailed on May 24th [R. 123; Ex. 5], contains some conditions. Subsequent analysis will show that appellee is again in error. The correspondence between appellant and Mr. Whipple was in absolute conformity with the original plan for the operation of the agency of Mr. Whipple.

B. The Contract Was Made by Its Very Terms Between the Parties to This Action.

Never did appellee extend any credit to Mr. Whipple. Always was it advised that he acted only as agent for his disclosed Argentinian principal. [R. 113, 117, 122, 124, 406, 408, 410, 412, 413; Exs. 2, 3, 4, 5, 56, 57, 58.] The contract is, by its terms, clearly, definitely and certainly between appellant and appellee. Any attempt to insert the name of Mr. Whipple as a principal therein is unjustified in fact and is an attempt by parol argument to vary the terms of the written instrument. The testimony to which appellee makes reference in no sense accomplishes the result which its counsel seeks. Nowhere in the evidence is one single thought shown in the minds of any of the parties but that the contract was between the parties to the action. In the four contract letters and in Mr. Donnelly's report to Mr. Kiefer [R. 408; Ex. 58], in the check of financial standing of appellant made by appellee [R. 835-838; Ex. R-3], it is apparent that appellee well understood and at all times relied upon the fact that it was purchasing from appellant and from no one else. It is true that Mr. Whipple was thousands of miles away from his principal; that he was dealing in a commodity with a rising, highly specu-

lative market, and dealing with a vendee of known, well-established credit. He was required to believe and did believe it necessary to take great responsibilities upon himself in the consummation of a transaction in which the vendor and the vendee were both anxious to procure immediate action. But at no time did he act other than as agent under the general instruction of his principal.

1. Parol evidence cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument.

Harrison v. McCormick, 89 Cal. 327, 26 Pac. 830.

“We do not see how the admission of this evidence can be sustained. Its effect was to show that coal was sold by sample, and thereby to import into the contract a warranty that the coal sold was to be equal to the sample. When the contract is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence cannot be allowed to show a sale by sample. . . .

“It is claimed that the agreement proven by plaintiff was a mere informal memorandum, incomplete upon its face, and not intended to contain all the terms of the contract, and that for this reason the oral evidence was proper. We do not so regard the writing under consideration. It contains within itself all that is necessary to constitute a contract, and this being so, in the absence of any averment in the answer of defendants that there was an omission or mistake made in reducing it to writing, it is not competent to show by oral evidence that it does not state all of the terms of the agreement.

“The question whether a writing is upon its face a complete expression of the agreement of the parties

is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: 'If it imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.'

Pacific States C. Co. v. Steiner, 192 Cal. 376-7,
220 Pac. 304;

Harding v. Robinson, 175 Cal. 534-40, 166 Pac.
808;

Heffner v. Gross, 179 Cal. 738-42, 178 Pac. 860.

"Section 1625 of the Civil Code and Section 1856 of the Code of Civil Procedure do more than declare rules of evidence. They lay down positive, substantive law. 'These sections declare a rule of law so long and so well established that it is needless to cite further authorities in its support.'"

Estate of Gaines, 15 Cal. 2d 255-64, 100 P. 2d
1055.

"The parol evidence rule, as is now universally recognized, is not a rule of evidence, but is one of substantive law. . . ."

Jones on Evidence, 3rd Ed., Sec. 434, p. 656;
32 C. J. S., Sec. 851, p. 784.

2. Parol evidence, even though admitted without objection, must be ignored as of no legal import and its incompetency to vary a written contract is a matter of law.

Liftov v. Hershman, 80 Cal. App. 2d 422-32, 182 P. 2d 222;

Rottman v. Hevener, 54 Cal. App. 474-79, 202 Pac. 329;

Hall v. Remp, 73 Cal. App. 2d 377-81, 166 P. 2d 372.

II.

The Two Contracting Corporations Were Each Bound by the Meeting of the Minds of Their Respective Contracting Agents Thereunto Duly Authorized.

A. The Knowledge of the Respective Contracting Parties and Their Agents.

Second, in the orderly construction of a contract is a consideration of the meeting of the minds and acceptance by each party of the contractual terms. The portions of the brief of appellee extending from page 24 to page 42 are here considered. Argument and citations dealing with the parol evidence rule given under the preceding heading necessarily have strong effect upon the treatment here given.

Appellee had full knowledge of the respective terms of the contract and the meaning of each term. This is clearly shown in the letter of Mr. Donnelly, appellee's duly authorized contracting agent, to Mr. Carl J. Kiefer, his superior, under date of May 23, 1946, and May 24, 1946 [R. 408-412-413; Ex. 58]. The contract is there

carefully restated at length and in detail. Advice is given that Mr. Donnelly has acknowledged and accepted the contract as made. This was in accord with his letter to Mr. Whipple of May 23 and May 24, 1946 [R. 123; Ex. 5].

Appellant had full knowledge of the respective terms of the contract and the meaning of each term [R. 146, 147]. It was, in fact, stipulated in open Court, that the original documents constituting the contract were sent to Mr. Berger by Mr. Whipple [R. 146-147]. Advice that all terms, conditions and negotiations of Mr. Whipple were satisfactory to appellant was conveyed to appellee by the cables of June 5th and June 8th [R. 272 and 279; Exs. 27 and 28]. However, the exact knowledge which Mr. Berger may or may not have had is entirely immaterial, except upon the part of ratification. There is no question but that Mr. Whipple had full knowledge, at all times, of the contract terms. His knowledge is that of his principal and his principal's that of himself.

The meeting of the minds of the two contracting agents of the parties is clear. Both Mr. Whipple and Mr. Donnelly had full and complete knowledge of each and every part of the contract as made. Statements such as that on appellee's brief (p. 41) that there was no agreement on quantity and price are simply without warrant. Definite was the agreement for quantity, 1135 tons; price 1.375 pesos per kilogram, exchange rate 335.82 pesos to \$100.00; period and amount of shipment as in shipping schedule; terms of payment, by letter of credit, paid on delivery on board ship Buenos Aires Harbor, packaging in wood cooperage, 660 pounds each, analysis of commodity, certificate of analysis and of cooperage to accompany draft under letter of credit and finally the ac-

ceptance of the purchase, by letter of acceptance to Mr. Whipple for transmission to appellant [R. 408; Ex. 58].

The knowledge of the two respective agents for the contracting parties being clear, the contracting parties themselves are conclusively held to have possessed all knowledge of their respective agents.

Restatement of Law of Agency, Sec. 272, p. 603;
Watson v. Sutro, 86 Cal. 500-516, 24 Pac. 172.
Shamlan v. Wells, 197 Cal. 716-20.

“The general rule is well settled that the knowledge of the agent in the course of his agency is the knowledge of the principal. (1 Cal. Jur. 846, and cases cited.) It rests on the assumption that the agent will communicate to his principal all information acquired in the course of his agency and when the knowledge of the agent is ascertained the constructive notice to the principal is conclusive.”

Vanceil v. Kumle, 26 Cal. 2d 732-34, 160 P. 2d 802;

Shapiro v. Equitable L. Ins., 76 Cal. App. 2d 75-87, 172 P. 2d 725.

“ . . . One who acts through an agent will be presumed to know all that the latter learns concerning the transaction, whether it is actually communicated to the principal or not. There is no difference in this respect between actual and constructive notice. It is of no avail that the agent failed to communicate to his principal what he had ascertained.”

The cables passing between appellant and Mr. Whipple are under the rule relating to the interchangeable knowledge of principal and agent above noted, wholly immaterial. They in no respect bear out the contention which appellee seeks to make. In so far as any reference to any of them seeks to vary or modify the terms of the written contract, such evidence is, as noted in the preceding heading, wholly incompetent under the parol evidence rule. Under the rule of the *Rice-Schmid* cases, considered in appellant's opening brief, the fact of the purchase or holding by appellant of any glucose tonnage is irrelevant.

The references in the brief of appellee from pages 26 to 31 and from pages 33 to page 36 do not merit further discussion. It is proper to note that the statements on page 32 that appellant accepted an offer at 1.30 pesos per kilo, that Mr. Whipple ever made an offer, or that appellant ever claimed that the cable of May 22nd was either an offer or an acceptance are simply incorrect. As noted under the preceding heading, these communications were solely instructions to appellant's agent, Mr. Whipple, in accordance with the plan of the April letter.

B. The Form of the Contract May Be Oral or Written.

The contract in the case at bar is a contract for the purchase and sale of merchandise of a value of more than Five Hundred (\$500.00) Dollars. It was made in California. It is, therefore, subject to the law of that state.

California has adopted the Uniform Sales Act. There the form of the contract is prescribed in

Civ. Code, Sec. 1723.

“Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal) as by word of mouth, or partly in writing and partly by word of mouth or may be inferred from the conduct of the parties.”

Each of the four letters evidencing the contract commences with stating substantially as does the confirmatory letter of May 23-4, 1946:

“This will confirm our telephone conversation.”
[R. 123; Ex. 5.]

The whole contract was actually made by the oral telephone offers and acceptances. The letters themselves only purport to confirm the oral conversation and evidence therein. The oral testimony in Court verifies this position. The pleading alleges that to be the case [R. 55].

“that said contract was evidenced by four letters in writing passing between plaintiff and defendant, respectively of dates May 20, May 21, and May 23, 1946.”

The various strictures upon the contract made by appellee, if they were valid at all, could only be so if the letters were the sole basis for the formation of the contract. They, however, in and of themselves, prove that they were only confirmation of the extended, various telephone conversations containing the offers and acceptances. The letters solely constitute the necessary memorandum under the

Statute of Frauds (Civ. Code, Sec. 1724). Appellee itself has given to the Court a clear, definite and comprehensive statement of the contract terms in the letter from Mr. Donnelly to Mr. Kiefer" [R. 411; Ex. 158]. This was sent after a telephone conversation with Mr. Whipple, is a résumé thereof, and expresses the fact that he has acknowledged and accepted the offer of Mr. Whipple on behalf of appellant. This letter, as the trial Court held, in and of itself, was sufficient to constitute the necessary memorandum in writing [R. 58]. This doubtless was one of the substantial items of evidence upon which the Court relied in its decision and findings.

The oral agreements of the parties, as evidenced in the letters of Mr. Donnelly to Mr. Whipple and covered by his letter to Mr. Kiefer, clearly shows the contract as made. This oral agreement, under the pleadings and under the law, is the agreement.

Clarke v. Fiedler, 44 Cal. App. 2d 838-41, 113 P. 2d 275;

Gibson v. La Salle Institute, 66 Cal. App. 2d 609-631, 152 P. 2d 774.

"But section 1723 of the Civil Code, which is a part of the Uniform Sales Act, provides that a contract to sell, or a sale, may be made in writing or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. And section 1724 of the Civil Code, which is the same as section 1624a of that code, does not require that all of the details of a contract of sale be set forth in the writing. The note or memorandum of a contract of sale is merely evidentiary. In *Clarke v. Fiedler*, 44 Cal. App. 2d 838, 846

(113 P. 2d 275), the court said that 'the formal written contract is not the agreement of the parties, but only evidence of that agreement.' "

Reference may be here made to the cases cited under the immediately succeeding heading which in large measure are apropos.

C. The Ratification.

The contract was complete with the acceptance letter from appellee of date May 23-4 [R. 123; Ex. 5]. It was stipulated in open Court that appellant had full knowledge of the terms and wording of the last-mentioned letter [R. 147]. On June 5, 1946, prior to any notice of repudiation, appellant confirmed the entire contract for the sale of 1135 tons by its cable of that date to appellee [R. 272; Ex. 27]. Thereby each and all of the terms, conditions, covenants and agreements contained in the contract were accepted and confirmed by appellee. This, in itself, renders fruitless the animadversions of appellee, now made. The cable clearly stated that appellant, acting in good faith on the confirmation letters had purchased the 1135 tons for delivery thereunder.

Appellant filed its suit herein. At the time of filing, it had full knowledge of the terms and conditions of the contract and of the various operations of Mr. Whipple in negotiating and concluding the contract. The filing of the action with such full knowledge was a complete ratification of all preceding acts.

Cowan v. Tremble, 111 Cal. App. 458-63, 296 Pac. 91;

Harper v. Goldschmidt, 156 Cal. 245-50, 104 Pac. 451.

D. The 400 Ton Oral Contract.

The parties clearly and definitely dealt in the four letters with a contract for the purchase of 1135 tons and no more. This is evidenced by the contemporaneous letter of Mr. Donnelly to Mr. Kiefer. Mr. Whipple testified [R. 131] that in a telephone talk with Mr. Baglin on May 28th, he offered to Mr. Baglin, the assistant to Mr. Donnelly, 200 to 400 tons of glucose on the same terms and conditions as the 1135 ton offer and Mr. Baglin then and there accepted. This was, therefore, a second oral contract upon which suit was not filed. The fact of the purchase of the glucose, as noted in the opening brief under the rule of the *Rice-Schmid* cases is wholly immaterial, except possibly to show the ability on the part of appellant to perform.

E. The Letter of Credit (Br. p. 36.)

"The mechanics of payment were not a condition precedent in the consummation of the contract, and were not considered such by the parties" [R. 58] is that which the trial Court held in its decision.

A letter of credit is nothing more or less than a guarantee that the contract price will be paid. In this case, it was to be a guarantee by an American bank to a bank in Buenos Aires that appellee would pay the purchase price of the glucose.

California Civ. Code, Secs. 2858 *et seq.*;

38 *C. J. S.*, Sec. 7, p. 1142;

9 *C. J. S.*, Sec. 176, p. 384.

The letter of credit could, in no way, be a part of the contract. (Mr. Donnelly testified that the terms of the

letter of credit were not discussed [R. 689].) In fact, Mr. Donnelly knew nothing about the form of such letter [R. 688]. The letter of credit is a well known document of comparatively simple form. Appellee by its contract with appellant agreed that it, the appellee, would make a contract with a third party and would thereby procure a surety that appellee would pay at Buenos Aires the stipulated purchase price at the respective times of delivery. Breach of this obligation by appellee could well be held a breach of its contract. But it was only a part of the mechanics of payment, as the Court stated. Necessarily, all of the terms of the contract with the third party surety could not enter into this purchase contract.

F. The Delivery to McCormick Steamship (Br. p. 37).

“The price listed is F.O.B. steamer, Buenos Aires, packaged in wood cooperage containing approximately 660 pounds each” [R. 124; Ex. 5] is the wording of the contract acceptance by Mr. Donnelly; this is reiterated in his report to his superior, Mr. Kiefer [R. 400; Ex. 58]. These two documents also show that the first delivery of 50 tons was to be made in June. Mr. Whipple informed appellee in his letter of May 23rd [R. 122; Ex. 4] that “the next boat starts loading about the 29th and will sail on June 9th.”

Appellee, under the contractual terms was under the duty to notify appellant that it had engaged space in a particular freight steamer loading in Buenos Aires Harbor on a certain date in June and that the master of such steamer would accept on board the 50 tons of glucose as freight for carriage to the United States. If appellee

did not give appellant timely notice that a certain freight steamer would accept said freight during the month of June and in each delivery month thereafter, appellee would be liable for breach of contract. The duty of appellant under this F.O.B. contract did not require it to select a steamer or to pay the freight. As appellee was required to pay the freight, it must select and designate to appellant the steamer. Whether appellee made the designation in its acceptance letter or at a later time is immaterial. It was a designation which unquestionably could have later been changed by appellee and appellant could have made no objection to such change under the rule of

Meyer v. Sullivan, 40 Cal. App. 723-31.

G. The Metric Tonnage (Br. p. 37).

The four letters clearly speak of metric kilogram and tons; reduction is even made to the equivalent in pounds and the price in pounds and dollars is calculated from the metric measure and pesos. Therefore, it is difficult to ascertain on what basis appellee can possibly claim that metric tonnage was not described. The letter of Mr. Baglin of May 20th [R. 112; Ex. 2] does speak of a price of 22.3¢ per pound Pacific Coast port. But Mr. Whipple's reply [R. 116; Ex. 3] corrects these statements. It gives the peso price per kilogram and transmits that into the dollar price per pound. He definitely states that 1 kilogram is the equivalent of 2.2046 pounds. In the letter from Mr. Whipple of May 23rd [R. 122; Ex. 4] he plainly states: "You will understand that they confirm actual purchase for your account of 1135 metric ton of glucose in accordance with shipping schedule given."

H. The Acceptance Was Complete.

It is a truism of the law of contracts that the acceptance of an offer must be absolute and unqualified. Appellee in its brief (pp. 38 to 42) advances nothing but that which everyone knows. But the claim that the acceptance in the case at bar contained any request for modification or change of terms is simply not in accordance with the facts, findings and documentary evidence which has heretofore been thoroughly analyzed.

a. Appellee undertook to accept and pay for the glucose at the specified delivery dates. It undertook to procure a surety on a letter of credit that this payment would well and truly be made. The offer as evidenced by letter so requires [R. 117; Ex. 3]. The acceptance as evidenced by letter so confirms [R. 124; Ex. 5].

b. Appellee undertook to accept delivery on board a ship in Buenos Aires Harbor. It undertook thereby to engage a vessel to carry the freight and pay the carrier for that service. It undertook impliedly to notify appellant of the name of the vessel so appointed as carrier both in June and in each subsequent delivery month which would accept the deliveries under the contract. The offer so requires and the acceptance so confirms. For expedition it gives the name of the carrier selected.

c. Appellee and appellant both clearly knew that the letter of acceptance was the final closing of the contract. The purchase order was never intended to be signed or accepted by appellant. This is developed in the immediately succeeding heading.

d. The metric tonnage was an integral part of the actual offer [R. 116, Ex. 3, and R. 122, Ex. 4]. This was accepted by appellee [R. 124; Ex. 5]; in accepting the price at 1.375 pesos per kilogram.

e. Forsooth, if there were any point to these cavilings of appellee, they would be dispelled by the acceptance cable of appellant to appellee of date June 5, 1946 [R. 272; Ex. 27].

The governing rule, in cases such as this, is given in 17 *C. J. S.*, Sec. 43, p. 384.

“If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because it . . . contains terms not in the offer, but which the law implies as a part of the offer or because of a request or suggestion to have the contract more formally drawn up and executed.”

The cases cited by appellee under this head bear in themselves proof that they are, under the evidence, inapplicable to the case at bar. The manifested intention of the parties in this case at bar was that the contract evidenced by correspondence was the only one to be signed or executed by the parties. Mr. Donnelly, in so many words, has said so. The cases cited by appellee all hold substantially that when both parties agree that the contractual relationship will arise only when a subsequent contract is reduced to writing and signed by both, then they must await the execution of such writing. In the case at bar, Mr. Donnelly himself stated that the letters which he summarized in his report to Mr. Kiefer [R. 408; Ex. 58] contained all of the details. Examination of the letters has shown that, in this, he was correct. The true

rule applicable to the case at bar is, therefore, that set forth in the line of cases.

Allan v. Guaranty, 176 Cal. 421-27, 168 Pac. 884;

Conner v. Plank, 25 Cal. App. 516-18, 144 Pac. 295;

Nolte v. Sou. Cal. H. B. Co., 28 Cal. App. 2d 532-4, 82 P. 2d 946;

Producers Fruit v. Goddard, 75 Cal. App. 737-63, 243 Pac. 686.

Both of the last-cited two cases distinguish the cases cited by appellee.

Church v. Wade, 80 Cal. App. 2d 412-19, 182 P. 2d 212.

“The futility of appellant’s claim that the understanding between decedent and defendants was that before a contractual relationship should exist between them after their oral agreement, the terms thereof should be reduced to writing and signed by them, is manifest from what was said by this court in *Kreling v. Walsh*, 77 Cal. App. 2d 821, 834 (176 P. 2d 965) (hearing denied by the Supreme Court) as follows: ‘Furthermore, a contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed. The test is—did the minds of the parties meet; that a proposal for a contract was made by one party and accepted by another; that the parties definitely understood and agreed upon the terms of the contract; and, finally that as a part of the mutual understanding it was agreed that a written

contract embodying the terms agreed upon should be prepared and executed by the respective parties. Under such circumstances, neither party is at liberty to refuse to perform. (*Thompson v. Schurman*, 65 Cal. App. 2d 432, 440 (150 P. 2d 509); *Nolte v. Southern California Home Building Co.*, 28 Cal. App. 2d 532, 534 (82 P. 2d 946); *Clarke v. Fiedler*, 44 Cal. App. 2d 838, 847 (113 P. 2d 275).)’ ”

The cited *Clarke v. Fiedler* case, at page 847 cites and quotes with approval a case apropos to the case at bar.

“The reason for the rule is thus aptly stated in *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209 (39 N. E. 75, 43 Am. St. Rep. 757, 29 L. R. A. 431): ‘Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. . . . If the parties did not become bound in this case they cannot be bound in any case.’ ”

Kreling v. Walsh, 77 Cal. App. 2d 821-34, 176 P. 2d 965.

“Furthermore, a contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection

interposes, as the written contract would be if executed. The test is—did the minds of the parties meet; that a proposal for a contract was made by one party and accepted by another; that the parties definitely understood and agreed upon the terms of the contract; and finally, that as a part of the mutual understanding it was agreed that a written contract embodying the terms agreed upon should be prepared and executed by the respective parties. Under such circumstances, neither party is at liberty to refuse to perform.”

Thompson v. Schurman, 65 Cal. App. 2d 432-40,
150 P. 2d 509.

“The rule is well established and uniformly followed that when the respective parties orally agree upon all the terms and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.”

17 C. J. S., Sec. 49, p. 392;

Restatement of Law of Contracts, Sec. 26.

“Mutual manifestations of assent that are themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but other facts may show that the manifestations are merely preliminary expressions as stated in Sec. 25.”

It was necessarily implied by the very terms of the contract that appellee would pay for the goods purchased. The Court stated that the "mechanics of payment were not a condition precedent" and the oral testimony demonstrates that part; likewise, the designation of the carrier was necessarily implied by the very terms of the contract. The metric tonnage was an integral part of the contract. The purchase order was not intended to be signed or to, in any way, affect the contract, as evidenced by the written acceptance. The case at bar, in no respects, comes within the ambit of the theory stated by appellee, but by outlining things which appellee was bound to do, demonstrates that it, in itself, was and was intended by the parties to constitute the complete contract acceptance.

I. The Decision of the Trial Court.

A trial judge of long experience, both on the State and Federal Bench has heard the evidence of the parties. He is a jurist noted for the thorough study which he gives to the facts and law applicable thereto in every case coming before him. Such a Court, so endowed, has seen and heard the witnesses in the case. He has coordinated the testimony as in the making of the contract with the testimony as to the actual construction placed by the parties upon the four letters evidencing that contract. He has considered the acts of appellant. He has noted the respective witnesses, Mr. Whipple and Mr. Berger for appellant and Mr. Donnelly and Mr. Baglin for appellee. He has pondered over the contemporaneous construction placed thereon by Messrs. Metcalf and Dichter in their

dealings with Mr. Berger, as outlined in opening brief, pages 28 to 33. He has considered the rule of the California Civil Code, 1783. He has considered that the four letters only purport to be confirmation of oral telephone communications between the parties and that the letters themselves are the substance of those oral negotiations and offers and acceptances made by telephone. He noted and gave due effect to appellant's cables of June 5th, 1946, sent after full knowledge by appellant of the May 23-24 acceptance letters from appellee. With all of these facts and the law pertaining thereto before him, aided by the arguments of counsel, as here outlined, and having the full effect of Section 1783 in mind, he found a fully valid contract on his decision [R. 58].

"1. I find that a valid contract was entered into by the plaintiff and the defendant. The written communications between the parties set forth fully the essential conditions of the transaction. The mechanics of payment were not a condition precedent to the consummation of the contract, and were not considered such by the parties. More, I am of the view that the office memorandum, dated May 23, 1946, signed by J. B. Donnelly (Plaintiff's Exhibit 58), is a sufficient memorandum embodying all the elements of a valid contract, even if the documents which preceded it were not legally sufficient. (See, Restatement, Sec. 209; 2 Williston on Contracts, Revised Ed., 1936; Sec. 579; *Moss v. Atkinson*, 1872, 44 C. 3; *McKevitt v. City of Sacramento*, 1921, 55 C. A. 117). The letter speaks of a consummated purchase and of a letter of acceptance which was being sent to Engraw's representative. These statements are not the declarations of a subaltern, but those of an authorized executive whose interpretation of the transaction sets forth clearly its purport."

III.

The Contract Composed of the Four Letters Contains All of the Terms Agreed Upon and No Future Negotiations Were Contemplated.

The contract is one for the purchase of 1135 tons of glucose with delivery F.O.B. ship at Buenos Aires Harbor. The periods of delivery were seven in number at different monthly periods and amounts. The price to be paid, including the rate at which the foreign exchange would be settled were set forth. The specifications of quality and manner of shipment were fixed. Appellee claims, however, that inasmuch as it mentioned a purchase order to be issued by it, its own failure to issue such purchase order caused the contract to be incomplete. It admits that the purchase order was not to be executed by appellant and that no further negotiations were contemplated.

A. The Contract as Evidenced by the Letter Was Intended by Each Party to at Once Take Effect as a Complete Contract.

The evidence is replete with statements of each party that they were here dealing with a product, the subject of a highly speculative market. Clear it is that appellee was very anxious to secure immediate delivery [R. 710]. Essential it was that the contract for future deliveries at a specific price be given prompt action. Delay would be perilous. No one could await the mailing of a formal document from the United States to Buenos Aires and no one ever intended that such be done.

**B. The Negotiating Agents Intended That the Letters
Evidence a Complete Contract.**

On May 22nd, Mr. Donnelly conferred with his superior, Mr. Kiefer. On May 23rd and 24th, he wrote him a letter to "confirm our conversation of yesterday." In this letter [R. 408; Ex. 58] and doubtless in the conversation referred to therein, he outlined the whole contract and stated:

"We believe there are two possible methods of handling the mechanics of purchasing this material and because of the size of the order we favor the first.

We will advise Whipple, by letter, of acceptance of the 600 tons at the price quoted, for further transmission to Engraw [R. 411]."

He also stated in that letter [R. 410]:

"I will accept the additional 700 tons of 1946 material if it can be made available."

He suggests two methods for a purchase order issuance [R. 411]:

"Preparation in Cincinnati of 'the necessary purchase orders *for direct transmittal to Engraw in Buenos Aires*, and at the same time arrange for the letter of credit through our New York Bank to cover this purchase.'

The second method would be to have our West Coast Purchasing Department issue the purchase order, with copy to Cincinnati. You or Del Eberts could then arrange for the proper letter of credit to be issued from New York to cover the purchase.

I believe the information contained herein is sufficient to issue the purchase order. I would appreciate your advising me if you intend to have Del follow through on this.

We have written a letter of acceptance to Mr. Whipple, copy of which is attached for your information."

He then notes in his postscript to the letter to Mr. Kiefer that notice has been received that appellant was able to deliver 1135 tons and states:

"We therefore have changed our letter of acceptance accordingly." [R. 412.]

The letter of acceptance to Mr. Whipple here appears as an integral component of the letter to Mr. Kiefer and contains the clear unequivocal statement:

"We wish to *acknowledge and accept* the offer of Cia Engraw Commercial & Industrial S. A. of 1135 tons," etc.

The only tenable construction which can be placed upon this letter is that the letter to Mr. Whipple of May 23-24 was and was intended by the parties, especially by appellee, to be the final conclusion of the contract. The two methods involved merely relate to whether the purchase order will be issued in Cincinnati or in San Francisco and it is stated in the letter that the information contained there will be sufficient to issue the purchase order.

The oral testimony clarifies the situation, Mr. Donnelly testified [R. 692]:

"Q. You never mentioned anything to Mr. Whipple at any time about ever requiring the signature of Engraw for anything, did you? A. No, sir, I did not."

Therefore, there was no intention that appellant sign the purchase order. The purchase order was merely a part of the accounting system of appellee. There was no

intent that it be or become the contract of the parties. There certainly was no intention that Mr. Whipple would sign the purchase order. The acceptance letter and the letter to Mr. Kiefer, in so many words, states [R. 124] that it will be sent to Buenos Aires.

“A purchase order will be sent to Cia Engraw and Industrial S.A., as soon as possible, covering this purchase, and a letter of credit will be set up to cover the full amount in pesos.”

As the trial Court stated, the purchase order was “a mere part of the mechanics.” The letter to Mr. Kiefer speaks of a consummated purchase and of a letter of acceptance which was being sent to Engraw’s representative.

**C. The Purchase Order Was by the Negotiating Agents
Never Intended to Be a Part of the Contract.**

The terms of the purchase order were at no time discussed during the negotiations [R. 701]. Appellee presented in evidence that which was identified as the standard form of purchase order used throughout the organization of appellee. Mr. Donnelly testified that this was the form to which he had reference in his conversation with Mr. Whipple [R. 684-5]. Nowhere does it appear that Mr. Whipple had any knowledge of the contents of the purchase order.

The obverse side incorporates in the contract the 19 conditions on the reverse side. The pertinent portions are copied in the appendix. Various of the conditions are wholly inapplicable. Paragraph 7 directly contradicts the prices agreed upon and Paragraph 15 in that it seeks conformity of Argentina employees with American labor practices is idle.

But Mr. Donnelly himself testified [R. 678] as to a talk with Mr. Whipple on May 14, 1946.

“He (Mr. Whipple) told me at that time that he was able to secure the glucose, that *would be above the ceiling price* and he assured me that it would not affect our sugar quota and that it was legal to bring it into the United States.”

It was definitely understood between the parties as an essential provision of the contract of purchase that the glucose purchased would not be

“invoiced at prices which compare to and comply with regulations or any amendment thereof, of the Office of Price Administration.” (Appendix.)

D. A Binding Contract Is Effected When the Parties Have Agreed Upon All of the Essential Facts, Notwithstanding the Fact That a More Formal Instrument Was Later to Be Issued.

There is no lack of harmony between the cases cited by appellee and those hereafter cited as establishing the rule governing the case at bar. Substantially the rule of appellee's cases is that set forth in the excerpt from *Toms v. Hellman*, 115 Cal. App. 74, quoted by appellee:

“For another reason the acceptance of the offers failed to make a contract, because *the offer by its terms clearly contemplated that the complete contract should be embodied in a written contract to be subsequently executed.*” (Italics added.)

The evidence incontrovertibly proves that the parties in the case at bar contemplated that the correspondence ac-

tually did evidence the complete contract; it further proves that the parties had no intention but that the purchase order to be issued would conform to the acceptance letter nor was there any intention that it in itself would form a contract or that it ever would be executed. The true rule is therefore that as set forth in such cases as *Columbia Pictures v. de Toth*, 87 Cal. App. 2d 621, 629, 197 P. 2d 580:

“The cases are legion to the effect that when the respective parties orally agree upon all of the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement. (*Johnston v. 20th Century-Fox Film Corp.*, 82 Cal. App. 2d 796, 820 (187 P. 2d 474); *Kreling v. Walsh*, 77 Cal. App. 2d 821, 834 (176 P. 2d 965); *Gibson v. De La Salle Institute*, 66 Cal. App. 2d 609, 630 (152 P. 2d 774); *Thompson v. Schurman*, 65 Cal. App. 2d 432, 440 (150 P. 2d 509); anno. 122 A.L.R. 1217, 165 A.L.R. 756.)”

Church v. Wade, 80 Cal. App. 2d 412-18, 182 P. 2d 212:

“The futility of appellant’s claim that the understanding between decedent and defendants was that before a contractual relationship should exist between them after their oral agreement, the terms thereof should be reduced to writing and signed by them, is manifest from what was said by this court in *Kreling v. Walsh*, 77 Cal. App. 2d 821, 834 (176

P. 2d 965) (hearing denied by the Supreme Court) as follows:

‘Furthermore, a contract to make or execute a written agreement, when in all respects the terms thereof are mutually understood and agreed upon, is as valid and obligatory where no statutory objection interposes, as the written contract would be if executed. The test is—did the minds of the parties meet; that a proposal for a contract was made by one party and accepted by another; that the parties definitely understood and agreed upon the terms of the contract; and, finally, that as a part of the mutual understanding it was agreed that a written contract embodying the terms agreed upon should be prepared and executed by the respective parties. Under such circumstances neither party is at liberty to refuse to perform. (*Thompson v. Schurman*, 65 Cal. App. 2d 432, 440 (150 P. 2d 509); *Nolte v. Southern California Home Building Co.*, 28 Cal. App. 2d 532, 534 (82 P. 2d 946); *Clarke v. Fiedler*, 44 Cal. App. 2d 838, 847 (113 P. 2d 275).)’

Kreling v. Walsh, 77 Cal. App. 2d 821-4; 176 P. 2d 965;

Clarke v. Fiedler, 44 Cal. App. 2d 838-47; 13 P. 2d 275;

Nolte v. So. Cal. Home Bldg. Co., 28 Cal. App. 2d 532-34; 82 P. 2d 946;

Thompson v. Schurman, 65 Cal. App. 2d 432-40; 150 P. 2d 509;

Johnson v. 20th C. F. F. C., 82 Cal. App. 2d 796-820; 187 P. 2d 474.

The letters clearly evidence a contract of sale. Proof was adduced that there was no intention of making or executing any contract subsequent to that evidenced by the correspondence. Contrariwise, there was the distinct intention that a present contract had actually been concluded.

E. The Memorandum to Satisfy the Statute Is Sufficiently Evidenced by the Letters.

The written memorandum of the Contract of Sale is under the express mandate of Civil Code, Sections 1723 and 1724 and is merely evidentiary. It in itself need not be a formal contract. Substantially only these essential ingredients are required, to-wit, first, designation of the parties; second, the subject matter of the contract; and third, the price or consideration. The fourth element of a contract, that is to say, the meeting of the minds, in promise and acceptance, it is to be noted need not necessarily enter into the memorandum.

Gibson v. La Salle Institute, 66 Cal. App. 2d 609-31; 152 P. 2d 774;

Clarke v. Fiedler, 44 Cal. App. 2d 838-46; 113 P. 2d 275;

37 C. J. S., Section 174, page 652;

Restatement Contracts, Section 207.

Every viewpoint clearly establishes that the correspondence including the letters between Messrs. Donnelly and Kiefer were and were by the parties intended to evidence a present contract of purchase and sale.

IV.

Proof of Illegality of the Contract Was Wholly Lacking. Ability to Perform at the Dates at Which Performance Was Required Was Proven.

The proof was abundant that the glucose was purchased ready for export at the periods required by the contract. Appellant proved that it made the necessary applications for export of the glucose and that these applications were accepted. The evidence disclosed that other applications later made were accepted and shipment thereon made. Glucose was continuously exported from Argentina throughout the whole of the contract period. The glucose under the present contract would have been exported except for the breaches made by appellee of its contract. Such is the proof, such is the decision of the trial Court [R. 61]. This heading relates to appellee's brief, pages 64 to 71.

A. The Pleading.

Upon information and belief appellee alleged [R. 51] that

“the export of glucose from the Argentine Republic to any other country was specifically prohibited by the laws of the Argentine Republic, Nos. 12,591; 12,830 and Article 14 of Law No. 15,591 and regulations and orders regularly passed and made during the periods during which deliveries pursuant to the terms of said alleged contract were to be made by plaintiffs at a West Coast port of the United States.”

Law 15,591 never existed as a law. During the course of the proceedings, these figures were stricken and the figures 12,591 inserted. So only two laws, 12,830 and 12,591 were pleaded. The contract deliveries were to be

made on ship in Buenos Aires Harbor and not at any West Coast port of the United States. By the very terms of the contract, appellant was not required to take the glucose out of Argentina.

The pleading, in itself, was wholly insufficient to raise an issue. It pleaded only a conclusion on information and belief that by these two laws the export of glucose was specifically prohibited. True, it likewise includes a second conclusion, likewise on information and belief, that under these laws there were regulations and orders regularly passed and that some prohibition at some time existed under such regulations and decrees. No trace of any place, time or substance of any of the mythical regulations or orders is given. A foreign law is a fact to be pleaded as any other fact. It is essential, under the invariable rule to plead the substance of the law relied upon so definitely that the Court may determine the meaning and effect thereof. As will be seen on the examination of the evidence, neither of the two laws pleaded contained any prohibition of export whatsoever. The circumstances of time, place or authority by whom any one of the alleged regulations or orders was passed, or any reference to any substance or content thereof is wholly omitted. Not even the scantiest conception of "notice" pleading could warrant acceptance of these vague generalities.

59 Corpus Juris, Sec. 746, p. 1205.

"It is stated in general terms in many decisions that if a party relies on a foreign statute as the foundation of a cause of action or defense, the statute must be 'set out' or 'set forth,' or 'set out in terms,' or 'set out with certainty to a common intent at least.' It is not necessary, however, that the statutes be pleaded *in haec verba*, but it is necessary and sufficient that the substance of the statutes be pleaded, or, according

to terminology frequently used by the courts, that the substance of the statutes relied on be stated with sufficient distinctness to enable the court to determine the meaning and effect thereof. The fact that it is foreign statutes which are to be pleaded, it has been said, 'will afford no relaxation from the usual rules requiring a plain and concise statement in the petition, without unnecessary repetition, of the basic allegations constituting the cause of action.' "

Coronet Phosphate Co. v. U. S. Shipping Co., 260 Fed. 846.

It was held that it was only a pleader's conclusion in alleging that in consequence of the war "restraints, restriction and limitations that have been placed on shipping, both under neutral and belligerent governments, on shipments destined to Sweden and Holland," the Court further held that the pleader is bound to set out the substance of the foreign law so that the Court may judge whether it has the effect which the pleader ascribes to it.

Allen v. Markham, 156 F. 2d 653 (9th Cir., 1946).

A controversy over right of enemy aliens to take under a will of a decedent. The Circuit Court, in holding respondent cannot recover, stated, "It is conceivable that the foreign nation might without a treaty, have by its own statutes granted rights which were in fact fully reciprocal, if this were done by statute, it would have to be proved, and what must be proved to sustain a complaint must be alleged." There is no such allegation here.

The Baja, California, 45 Fed. Supp. 519 (1942 by District Judge Harrison).

In a controversy as to whether there was liability as the result of a shipwreck, defendant contended that the laws of Mexico should control the litigation and at the time of trial offered in evidence copies of certain laws, the Court stated, "The claimant defendant did not plead the foreign laws above mentioned and therefore the same were not admissible (21 R. C. L. 438-9)."

Valz v. First National Bank, 96 Ky. 543, 49 Am. St. Rep. 306, 309.

Where appellant attempted to plead the statute of limitations of a foreign state by alleging the effect of the statute the Court held such pleading to be defective, stating as follows:

"There is no allegation as to the terms and provisions of the statute of Alabama; there are no allegations which authorize the court to conclude that the plaintiff's right of action was barred because the action was not instituted within three years after the cause of action accrued. In the absence of a plea which shows the action is barred by the laws of Alabama, we hold that it is governed by the laws of this state. As there is no plea that the statute of this state would bar the right to recover, it could not be made available."

B. The Pleaded Laws Contained No Prohibition on the Export of Glucose.

Law 12591 was in effect from September 11, 1939, the date of its promulgation, to September 16, 1946, the date of the promulgation of Law 12830. [R. 754-5-6; Ex. 61; R. 765-768; Ex. 62.] In Article 14 of Law 12591, the executive power was authorized to restrict or prohibit the exportation of commodities for the requirements of the state. Section 2, Law 12591 provided, however, that within ten days from promulgation of the law, that is, September 11, 1939, the executive power must manifest the products which the act shall control and it is only such products which shall be governed by the act. There is nothing in the evidence to show even remotely that glucose was, at any time, within the ten day period by the executive power determined to be within the commodities described in Article 1 of the Act. In fact, glucose has never appeared in any order or decree give under this law. [R. 755, 767; Ex. 61 and 62.] There is no known rule, regulation or law under which the export of glucose has been prohibited. [R. 756; Ex. 61.] Law 12830, as noted above, was passed subsequent to August 29, 1946, to-wit, September 16, 1946, and export of glucose was expressly permitted under an order of August 29, 1946.

No regulations or orders were, at any time, made prohibiting the glucose exportation [R. 756; Ex. 61]. The resolution of August 24, 1946, No. 6926/46 [Ex. C in Varela Deposition; R. 757; Ex. 61] was that of the Secretary of Commerce and Industry wherein an exportable quantity of 4000 tons of glucose was for the period July 1, 1946 to September 31, 1946. The resolution of September 12, 1946, No. 7499/46 [Ex. D in Varela Deposi-

tion; R. 757; Ex. 61] was of the same Secretary and stated:

The limitation on the export of glucose is 4000 tons for a six-month period. This was in effect only from August 29th to September 12th. From the last date, exportation was returned to the system of licenses in vogue up to June 16th.

Depositions were produced by appellee dealing with the export laws of Argentina. The testimony so produced was unanimous in stating that "the export of glucose was not specifically prohibited by any of the laws referred to" [R. 893, 908, 929; Ex. T1, T2, T3]. Each stated that in June or July of 1947, they made inquiry as to an order prohibiting the export of glucose. No detail of time, place or term of any so-called order was made. These unknown informants told the witnesses that during the beginning of May, 1946, a verbal order was made, stopping exportation of glucose [R. 897, 919, 986; Ex. T1, T2, T3]. It was further testified that no publicity was given to this order. "I understand the order was not made public, it was made known only to the exporters who requested export permits, which were not granted." "I understand there is no such record" [R. 919; Ex. T2] is the answer to appellant's Cross-Interrogatory 5 F. [R. 887], which asked if there was any record or minute in any office of any such verbal order.

The witnesses of appellee all unite in stating that publication either in the Official Bulletin of Argentina or by posting must be given [R. 901, 924, 940; Ex. T1, T2, T3]. Admittedly, no publicity was given to this alleged order. If such order ever was made, the lack of publicity would invalidate. It casts suspicion upon the fact itself of any such order.

Two of the witnesses agree that if, in fact, glucose was actually exported and permits therefore given subsequent to the alleged order, their opinion as to the verbal order would be fundamentally affected “because if new permits had been granted, it would prove the inefficiency of the verbal order to which I have referred [R. 938, 921; Ex. T3, T2]. Mr. Robiola denies there could have been any such permit or exportation [R. 899, Ex. T1]. The evidence now to be reviewed will establish exportation throughout the whole period, and that permits issued upon which exportation was made.

Both experts on Argentina law called by appellant, Dr. Varela [R. 753-4-759; Ex. 61] and Dr. Padilla [R. 765-768; Ex. 62] testified that there was no “legal obstacle to fulfill the contract in those months (between June and December 1946) since an export permit could be requested from the government.” The experts were requested in the interrogatory 4 [R. 484; Ex. 60] to produce the pleaded laws, also a copy of each regulation and order passed under said laws and in Interrogatory 8 [R. 486; Ex. 60] to give their opinion as to whether any legal obstacle existed under Argentinian law which would render the performance of the contract at bar impossible. They each pronounced their professional opinion that no law, rule or regulation of the Argentine Republic was any obstacle to the fulfillment of the contract of appellant. No deliveries of glucose were prohibited by any law, decree, rule or regulation of Argentina.

The Court held the hearsay testimony of appellee’s hearsay witness as having little weight or credence and so stated in its Decision [R. 60]:

“I find that the plaintiff was able to perform the contract and no legal impediment has been shown to

exist for its performance. Regardless of the burden of proof, the evidence of an interdiction of export of glucose is, at best, very meagre. There is a showing that some one gave an oral order stopping the export of glucose for a short period of time in line with certain governmental price policy relating to the cost of living. No official publication of the order was shown. More, there is no showing that anyone in the Government considered it binding. . . .”

C. The Evidence.

Ample is the evidence proving beyond question that glucose throughout the period of contract deliveries from June to December 1946, both inclusive, was exported from Argentina and licenses therefor freely granted.

In the deposition of the Argentine dealers, the Eighteenth Interrogatory requested information as to exportation made and the incident details of payment of taxes and procurement of licenses. Mr. Dittisheim [R. 497-501; Ex. 60A] testified that his firm had, during the period, shipped over 900 tons and that “Export licenses have been forthcoming and we have paid the usual tax of 5% for same.” Mr. Auge testified [R. 507; Ex. 60B] to exportation of 171.6 tons of which 99.909 were exported during June 4, 1946 and that “The obtainment of export permits is done without difficulty.” Mr. Lang’s company, during the critical period, exported 1,475 tons. He detailed the dates of the shipments, amounts and places to which shipped. May, 62,800 kilos to the United States and 128,401 to Switzerland, and 24,784 to Palestine; June, 54,776 tons to the United States, 74,866 to Switzerland and 46,390 to Palestine; August, 104,310 to the United States, 59,699 to Switzerland; September, 97,822 to the United States, 6,150 to Switzerland, 47,849 to

Palestine; October, 84,804 to the United States; November, 178,675 to the United States; in December, 15,341 kilos to the Philippines. For each delivery, he had an export license in hand and delivered and shipped all glucose sales as stated.

Produced in evidence [R. 725 to 731] *were pages from the Monthly Résumé of Exportation*, a publication of the Bolsa de Comercio or Commercial Exchange, generally circulated among its members and in constant use which sets forth the total exportation from Argentina of all commodities. The pages produced in evidence related only to the exportation of glucose during the contract delivery months. The Exhibit [R. 732-8] show actual exports as follows: June, 841.6 tons; July, 135.2 tons; August, 1,066.1 tons; September, 178.5 tons; October, 107.2 tons; November, 935.1 tons; December, 53.9 tons.

The record of the dealers and of the *Résumé of Exportation* proves a constant and consistent exportation throughout each and every month of the contract period. No room is left for any plea of impossibility or inability to perform on this open, public and unbiased report of actual exportation.

Mr. Lang testified [R. 953] that he had been in business in Buenos Aires for ten years and engaged, among other things, in the exportation of glucose. He produced copies of three export permits authorizing the exportation of glucose. Each of these permits was stamped as received, by an official of the Bureau of Exportation and Importation, on May 28, 1946 [R. 955]. The tax receipts covering each of the permits were each dated June 11, 1946. The documents were received in evidence [R. 958-961; Ex. 71 to 71B]. The actual operation of the shipper is described in this testimony [R. 964]. The applications

are stamped as filed or within a day thereafter, then the tax is paid to the Central Bank, in this case on June 11th, *nearly two weeks after the application*. The receipt is obtained from the Bank. It is to be noted that the tax payment was not made for nearly two weeks from the application date. The Bank's tax receipt is then delivered to the Bureau of Export from whom the export license is procured. The export license is retained by the shipper until the merchandise is actually exported, at which time it is delivered to the custom house. The witness was thus unable to state whether he actually exported on the application filed May 28th in July or in August. No prohibition affected the *license or* exportation under these three licenses. Exportation under the license could legally be made at any time within 180 days from the date of its issuance [R. 987] and actual shipment subsequent to June 11th were actually made under this application of date May 28, 1946.

Exportation under the May 27, 1946 license application of appellant was prevented solely by appellee.

On May 27, 1946, appellant filed with the Argentine Director of Exports under law No. 12.591 a request to export to the United States 935 tons of glucose in wooden barrels of a value of 1.215.500 pesos [R. 247; Ex. 22, 23]. On July 4, 1946, it filed a second application to export 200 tons of glucose to the United States and upon the same date filed a third application to export 400 tons of glucose to the same destination. This made a total of 1,535 tons, embracing the 400 tons under the oral contract and the 1,135 tons under the contract evidenced by the letters. The two applications were necessary in that the application of May, under the Argentine rule was valid only for 180 days from date and so could cover only the

deliveries through November. The second application covered the December deliveries.

The Director of the Division of Permits for Export on receipt of the May 27th application replied to the application. He did not state that there was a ban on export licenses, but did state that in order to issue the permit, it was necessary to have a certificate of the manufacturer stating the quantity of glucose to be exported [R. 251; Ex. 24]. On May 30th, this certificate was furnished [R. 252; Ex. 25]. The only thing remaining to be done in order to secure the permit was to pay the tax. This tax could be paid at any time [R. 237, 258]. The tax on the 935 ton shipment of a value of 1,215,000 at 5% was 6,075 pesos the equivalent of fifteen hundred (\$1,500.00) dollars [R. 259]. Appellee failed to forward the letter of credit or designate a carrier or pay for the June shipment of 50 tons and for that reason only payment of the tax was delayed until the carrier was designated and the letter of credit received. But for the conduct of appellee of June 6th and its failure to arrange with the carrier and forward the promised letter of credit, appellant would have appeared at the Central Bank with its duplicate application, paid the 6,075 pesos, procured the receipt and export license would have issued. This was the course followed by the witness Lang, who filed his application a day later, on May 28, 1946, and paid his tax, June 11, 1946. Even more compelling is the fact, as it is evident from the conduct of appellee, that it had made no arrangement for the acceptance of delivery of the June glucose delivery upon a ship in Buenos Aires Harbor. Under the contract, appellant was required to make delivery upon such a ship. In fact, appellee appointed the ship of the McCormick line. This ship, as above noted, was loading May 29th and was due to leave

Buenos Aires June 9th, so it would be fruitless to pay the \$1,500 tax when no ship was available, and appellee had given no notification that any ship would ever be available.

It necessarily was the duty of appellee to arrange with the carrier steamship company to accept in Buenos Aires Harbor the glucose and designate such carrier and ship available for carriage to appellant. Under the contracts of appellant the glucose was fully paid, free at ship's side. All that was required of appellant was to pay the five centavos per kilogram to land it on a ship designated by appellee. The very position taken by appellee requires the inference that no ship was designated to appellant. Appellee thereby prevented fulfillment of the conditions of its own obligations, thereby breached the contract and rendered itself incapable of relying upon such condition to avoid liability.

Bewick v. Mecham, 26 Cal. 2d 92-99, 156 P. 2d 757;

Pacific Venture C. v. Huey, 15 Cal. 2d 711-17, 104 P. 2d 641;

Carl v. Eade, 81 Cal. App. 356-8, 253 Pac. 750;

Restatement Contracts, Sec. 315.

Each party to a contract is under the duty to do everything that the contract presupposes that he will do to accomplish its purpose and a duty not to prevent or hinder performance by the other party.

Tanner v. T. I. & T. Co., 20 Cal. 2d 814-25, 129 P. 2d 283.

No ship having been designated to carry the June shipment, it would have been a wholly idle act for appellant to pay the tax of \$1,500.00 and the stevedoring charges. Appellant well knew that it could, at any time, pay the tax and procure the export permit.

On June 30, 1946, Mr. Dichter, the employee of appellee, arrived in Buenos Aires and made a thorough independent investigation of the whole glucose situation. Admittedly, appellee was desirous of avoiding its contract. In case any ban on exports had existed, such as is now claimed, Mr. Dichter would have ascertained that fact and reported thereon. No plan such as he outlined and such as is described in the opening brief would ever have been made. Nor is it possible to conceive, from the very facts of the case at bar, that there was any ban on the exportation of glucose from Argentina during May of 1946. A responsible, careful business man, such as Mr. Berger, with the conservative background of his life [R. 220] and an actual resident in Argentina, making a sale involving nearly a half million dollars, certainly could not be imagined as being so totally and abysmally ignorant of conditions as to undertake to export the 1135 tons of glucose unless he well knew that export licenses were freely granted.

Request was made by appellee of the admission into evidence of Exhibit V, on October 21, 1948, although the trial ended June 9, 1948. Answer to this request was made October 26, 1948, wherein it was set forth that the original document was in Spanish, the translation proffered by appellee was incorrect; that it was on September 30, 1946 composed and sent by Dr. Medrano, who had been employed September 27, 1946. It was further therein stated that the statements of facts there made were incorrect and made on insufficient information of Dr. Medrano. Further, it was stated that the notice was a form of legal notice peculiar to Argentine mercantile customs, that the errors of fact therein stated were well known to the addressee and by reason of the various errors made

by Dr. Medrano, his employment was terminated. In the appendix attached hereto, there is a copy of the answer to request and a correct translation of the Spanish document. From the history of the case at bar, it will be noted that the facts insofar as they relate to appellee, are incorrect. From the contacts during July between the S. I. F. A. R. Company and Messrs. Berger and Dichter, they must have been known to be incorrect. The Exhibit V is not in the printed transcript, nor the proceedings relating to the admission thereof. For the purposes of this brief, it is to be noted that the correct translation states that "permits were not granted after last May." The evidence is clear, under Argentine law, that permits were granted under the express provisions of the August 29th order and of the September 16th order. The evidence is incontrovertible that a permit once issued was honored by exportation thereon during every one of the contract delivery months.

The June 16, 1946 governmental action solely effected a temporary suspension for study purposes of new export licenses and was expressly ineffective on exportation under previous permits.

Confirming the judicial notice which this Court would doubtless take of the accession of the Peron government to power in Argentina is the testimony of Mr. Lang that Juan Peron, although elected President in February of 1946, did not take office until June 4th of that year [R. 976]. He further testified [R. 976] that on June 16, 1946, the government proclaimed a campaign of 60 days to reduce the cost of living, which was given great publicity and this affected issuance of new export licenses. In no way, did this affect licenses theretofore issued. The witness Lang actually exported under such license after

June 16th on license issued before that date. He further testified "The Argentine Government never goes back on licenses already granted."

The Governmental proclamation clearly was not any regulation or order passed or made pursuant to either of the laws pleaded by appellee [R. 51] nor was it a specific prohibition as to the export of glucose or any other commodity. The proof shows that glucose was at all times exported. Granted that the Secretary of Industry and Commerce made some vague order. By the testimony of appellee's witness, it was effective only "until a study had been made of the maize market and of glucose in particular [R. 897, 911, 930; Ex. T1, T2, T3]. It is only natural that by reason of the third or fourth hand hearsay available to this witness, glaring inaccuracies appear in this testimony, even contradictions in the answers among the interrogatories and cross-interrogatories. All of the testimony demonstrates that the idea as to dates of the witness of appellee is wholly untenable. Mr. Lang's application was received on May 28th, processed; tax paid June 11th, and exportation thereafter made. Appellant's applications were received, without statement of any export ban, on May 27, 1946. The Peron Government acceded to power June 4th. It is reasonable to suppose, even if we had not the clear, definite testimony of Mr. Lang, that this new government put in by the "shirtless ones" would revise the cost of living after and not before it came to power.

A delay for any such temporary purpose as indicated by the witness of appellee in no respect operates to destroy a contract but merely suspends its operation for the duration of the embargo, depending upon the circumstances of the particular case and the pleadings thereof, various opinions in other jurisdiction may be found. It is, however, firmly established in California that, unless otherwise provided in

the contract, such temporary governmental suspension leaves the contract intact.

U. S. Trading Corp. v. Newmark, 56 Cal. App. 176-86, 205 Pac. 29.

This was a contract for the sale of 4000 tons of barley f.o.b. cars, California, with destination New Orleans. The Government Railroad Administration, in 1919, by embargo on use of cars, delayed the vendor in making delivery. The vendee claimed the failure on the part of the vendor to load the cars, when ordered, broke the contract.

“In embargoes such as this one was, the rule is that unless the parties have provided against it by their contract, they must submit to whatever inconvenience may arise therefrom. Congress in authorizing the establishment of such war-time regulations, did not intend to invalidate contracts of sale.” (Cases cited.)

“Our conclusion that an embargo such as this one was merely suspends performance of the contract and does not dissolve it, and that the doctrine of commercial frustration is not applicable to the facts of this case, is supported by the most recent decisions upon the subject.” (Cases cited.)

Graham, etc., Corp. v. Mt. View D. Corp., 37 Cal. App. 2d 315-21; 99 P. 2d 357;

Dorn v. Goetz, 85 Cal. App. 2d 407-16; 193 P. 2d 121.

A contract for the building of a house was involved. The building was delayed by enactment of the Veterans' Emergency Housing Act of 1946 which, in effect, limited residential construction to veterans' housing. Prevention by governmental regulation was claimed. The contract in issue was made February 16, 1946, and provided for com-

pletion July 1, 1946, with a 30-day leeway. The action was filed September 5, 1946. The Act provided for termination of its restrictions on December 31, 1947, and actually was repealed June 30, 1947. The Court, in its decision, reviewed the cases decided by California Courts on the doctrine of frustration and held that the burden of pleading and proof of harm by the alleged frustration lies upon he who claims harm thereby and approved the rule of *Newmark Grain* case.

Under the California rule, the burden of alleging and proving first, the unforeseeable risk of the governmental act and, second, that the value of performance is totally or nearly totally destroyed, is on him who asserts the issue.

Lloyd v. Murphy, 25 Cal. 2d 48-54; 153 P. 2d 47.

“The doctrine of frustration has been limited to cases of extreme hardship so that businessmen, who must make their arrangements in advance can rely with certainty on their contracts (*Anglo-Northern Trading Co. v. Emlyn Jones and Williams*, 2 K. B. 78; 137 A.L.R. 1199, 1216-1221). The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable.” (Cases cited.)

The evidence establishes that there was, in fact, no frustration, no prohibition of export, and no prohibition, at the time of application, for the issuance of export permits. At the best, there was a temporary suspension from June 16th to August 16th for the issuance of new licenses,

during a period of study. The McCormick line steamer sailed June 9th, without arrangement by appellee for freight space for the 50 ton June shipment. The pleadings and proof of appellee were wholly insufficient to raise the issue for which they now contend. The evidence clearly upholds and sustains the findings of the Court that appellant was, at all times, ready, willing and able to perform its contract. The decision of the Court, in this respect, is clear and in accordance with the law and the testimony [R. 61]:

“The showing is that, under Argentine law and the custom obtaining, payment of the license does not have to accompany the application, that no notice of action on the application is given unless there is a rejection, and that, in the absence of such rejection, the exporter can pick up the license at any subsequent time when he is ready to export by tendering the fee. There is also evidence in the record that other exporters actually exported glucose during this period. So the upshot of the matter is this: Regardless of any order of cessation of exportation of glucose, the fact remains that glucose was actually exported and that an application for a license to export the glucose involved here was actually received by the proper governmental agency, and not rejected. More, as the alleged order merely suspended for a limited period, its effect, even if proved, would only be to delay performance. Such delay would not destroy the validity of the contract on the ground of frustration. (See, *Patch v. Solar Corporation*, 1945, 7 Cir., 149 F. 2d 558.)”

Conclusion.

Clear and simple are the real issues presented and found by the trial Court. It determined, grounded upon ample evidence, that a contract of sale was effected between the parties and evidenced by the requisite memorandum. Necessarily, this determination excludes and makes irrelevant the cavilings of appellee. The determination includes the Whipple Agency, the finality of the contract found, the meeting of the minds of the parties, and the inclusion in the memorandum of all essential terms. The trial Court determined, grounded on ample evidence, that appellant was, at all times ready, willing and able to ship the contract glucose. This determination included, necessarily, a finding that only the breach of appellee in failing to furnish shipping in Buenos Aires Harbor, ready to take the glucose, prevented performance. The great weight given to the findings of the trial Court, even when based upon conflicting evidence, always must be borne in mind. The extensive examination of the findings called into question may be subject to criticism, in view of the weight to be given thereto. This examination has, however, demonstrated that on the Findings here involved the eminent trial Court gave the only tenable determination.

Respectfully submitted,

STANTON & STANTON,

Attorneys for Appellant.

MESIROV & LEONARDS,

Of Counsel.

APPENDIX I.

Exhibit A.

[TITLE OF COURT AND CAUSE.]

AFFIDAVIT ON ADMISSION UNDER RULE 36.

State of California, County of Los Angeles—ss.

LOUIS B. STANTON, being first duly sworn, deposes and says: That affiant is now and at all times since the inception of the above entitled case has been one of counsel of record for plaintiff in said action, and makes this affidavit for and on behalf of said plaintiff, and that the matters and things stated herein are all made upon the information and belief of affiant derived from various letters, correspondence and consultations.

That affiant has been informed by Argentine counsel that the Colacionado is a form of legal notice which is peculiar to the laws and the customs among merchants of the Argentine Republic. There seems to be no corresponding notice under Anglo-Saxon law.

That G. FRED BERGER, president of the plaintiff corporation, returned to Buenos Aires on or about the 25th day of September, 1946, from his trip to the United States; that said trip to the United States and the occasion therefor is more fully set forth in the deposition of G. Ralph Heymsfeld, filed upon the trial of the above entitled action; that upon said return, said G. Fred Berger had consultation with Mr. Dittisheim, and thereupon and on or about the 27th day of September, 1946, employed

one Dr. Medrano, an attorney duly licensed to practice in the Republic of Argentina; that said employment was made for the purpose of negotiating with the suppliers of glucose; that at the time of said employment, said G. Fred Berger briefly discussed the situation with said Dr. Medrano.

That on or about the 30th day of September, 1946, Dr. Medrano composed the Colacionado, caused it to be typed and sent; that said G. Fred Berger did not see the document before it was sent; that said Colacionado contained many errors due to insufficient information on the part of said Dr. Medrano, but said errors were unimportant for the purposes for which the Colacionado was sent.

That the said errors contained in said Colacionado were manifest to the addressee.

That the errors contained in this Colacionado, together with other errors made by said Dr. Medrano, required said G. Fred Berger to relieve said Dr. Medrano of his employment shortly thereafter.

That affiant positively avers that his first information from Dr. Bunge Guerrico, counsel in Buenos Aires, as to efforts to exclude this telegram, was in a letter from said counsel dated October 4, 1948, which arrived approximately October 11, 1948; that on October 19, 1948, affiant mailed instructions to Dr. Bunge Guerrico suggesting the following procedure: That the formal objection to the introduction of the telegram be made on the ground that it was not called for under the direct interrogatories, as well as upon the ground of inadmissibility under the Ar-

gentine law, and have said objections certified as part of the record so that the whole may be sent to our Federal Court in Los Angeles for determination; that any and all demands to a court in Argentina be and cease and the whole be referred to the Federal Court in Los Angeles for final determination.

Further affiant saith not.

Louis B. Stanton.

Subscribed and sworn to before me this 26th day of October, 1948.

(Seal)

John L. Welbourn.

Notary Public in and for said County and State.

APPENDIX II.

Exhibit B.

COLACIONADO

REPUBLIC ARGENTINA TELEGRAFO DO LA NACION

03 05

A Sifar

Reconquista 379

Buenos Aires

Procedencia	N.	F		Indicaciones
Buenos Aires	2023	175	17.15	Colacionado-Urbano

For	T	AF	Hoba	Recepcion	Fecha
Garcia .c	Copiado		18.25		30 Sep. 1946

Confirming conversation regarding glucose contracted with you: Due to the fact that export permits were not granted after last May, by resolution of paramount Government of the Nation, hindering us in the fulfillment of sales in North America during four months, now our patrons having in fact quit their purchases and this venture having no means to continue, facing the obligations contracted with you up to a time when there is sold actual supply of glucose which we have taken and acquired by contracts expiring on September first, we aver that it is impossible for us to receive further additional deliveries. In consequence, we propose to charge to our account the expenses of storage and interest on the value of the merchandise which remain under your control up to the time it can be sold. Furthermore, we authorize you to sell the same for our account at a price up to five centavos lower than our cost; likewise, we propose a meeting together with all of our suppliers who are in the same position, to determine in a common agreement the manner of protecting our mutual interests. Let this be legal notice.

Engraw Comercial e Industrial S.A.

APPENDIX III.

“Important—The terms and conditions embodied on the front and reverse sides of this order shall constitute the sole and entire contract of purchase of the articles described herein and shall not be binding upon the buyer unless signed by our director of purchases or such authorized person as has been designated in writing by our director of purchases to the vendor.”

Reverse Side Section 7 [R. 947].

“By acceptance of this purchase order, the vendor expressly warrants that all materials to be furnished hereunder, will be delivered in conformity to and in compliance with all applicable orders and regulations of the War Production Board, and will be invoiced at prices which conform to and comply with regulation, or any amendment thereof, of the Office of Price Administration, as expressed and set forth in any price schedule, Maximum Price Regulation, or the General Maximum Price Regulation whichever shall be applicable.”

No. 12261

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A.,
a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

BRIEF OF APPELLANT IN REPLY TO APPELLEE'S ANSWERING BRIEF.

STANTON & STANTON,
740 South Broadway, Los Angeles 14,
Attorneys for Appellant.

MESIROV & LEONARDS,
1618-20 Packard Building,
Philadelphia, Pa.
Of Counsel.

FILED

JAN 6 - 1950

PAUL P. O'BRIEN,
CLERK

TOPICAL INDEX

	PAGE
Restatement of the issues.....	1
Argument	3
A. The market and measure of damages.....	3
1. The governing and statutory rule for damages.....	3
2. The glucose market in August, 1946.....	5
3. Authorities of appellee.....	9
B. Mitigation of damages.....	10
1. The defense was not pleaded.....	11
2. Appellee's cases do not bear out its claims.....	11
3. The affirmative defense of minimization of damages was not raised in the trial court.....	13
4. The burden of proof of mitigation is on the party asserting the issue.....	14
5. All that could be done to minimize damages was actually done by appellant.....	16
C. The breach of contract to purchase commodities to be de- livered in the future involves payment of damages in ac- cordance with the statutory rule.....	18
D. The election of the seller has no retroactive effect.....	19
E. The contract rate of exchange must prevail.....	22
Conclusion	23
Appendix :	
Factual statements in appellee's brief.....	App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alderson v. Houston, 154 Cal. 1, 96 Pac. 84.....	21
Bagwell v. Susman, 165 F. 2d 412.....	1
Baylis v. Kingsholm Co., 5 Cal. 2d 68.....	13
Boston I. & M. Co. v. Rosenthal, 68 Cal. App. 2d 564.....	9
Coke v. County of Sutter, 206 Cal. 445, 274 Pac. 750.....	15
Cox & Son v. Crane Iron Works, 5 F. 2d 314.....	11, 15
Crane Iron Works v. Cox & Son, 28 F. 2d 328.....	11, 15
Erie v. Tompkins, 304 U. S. 64.....	11, 12
Lillis v. Western Fruit Growers, 44 Cal. App. 2d 826, 113 P. 2d 267	13
Lineman v. Schmid, 32 Cal. 2d 204.....	10
Packing Co. v. Sunland Sales Ass'n, 100 Cal. App. 126, 279 Pac. 1036	4
Renner v. McNeff Bros., 102 F. 2d 664.....	19
Robinson v. Raquet, 1 Cal. App. 2d 533.....	21
Roth v. Swanson, 145 F. 2d 262.....	11
S. P. Mill Co. v. Billiwhack S. F. L., 50 Cal. App. 2d 79.....	9
Samuels v. Drew & Co., 286 Fed. 278; 292 Fed. 734.....	12, 19
Segall v. Finlay, 245 N. Y. 61, 156 N. E. 97.....	13, 16, 22
Spitly, Estate of, 124 Cal. App. 642, 13 P. 2d 385.....	4
United States v. Benton Coal Co., 273 U. S. 337, 47 S. Ct. 351, 71 L. Ed. 670.....	3
United States v. Harris, 100 F. 2d 268.....	12, 19
United States v. 673 Cases, 74 Fed. Supp. 622.....	11
Vitagraph v. Liberty T. Co., 197 Cal. 694, 242 Pac. 709.....	15
Walker v. Harbor B. B. Co., 181 Cal. 773, 183 Pac. 356.....	21

STATUTES

PAGE

Civil Code, Sec. 1780.....	20
Civil Code, Sec. 1783.....	13, 19, 20
Civil Code, Sec. 1784.....	9
Civil Code, Sec. 3353.....	9

TEXTBOOKS

134 American Law Reports, p. 243.....	14
17 Corpus Juris Secundum, Sec. 472, p. 978.....	21
38 Corpus Juris Secundum, Sec. 1, p. 68.....	18
38 Corpus Juris Secundum, Sec. 86g, p. 148.....	18
Restatement of Law of Contracts, Sec. 336.....	15

No. 12261

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA ENGRAW COMMERCIAL E INDUSTRIAL, S. A.,
a corporation,

Appellant,

vs.

SCHENLEY DISTILLERS CORPORATION, a corporation,

Appellee.

BRIEF OF APPELLANT IN REPLY TO APPELLEE'S ANSWERING BRIEF.

Re-Statement of the Issues.

Three basic factual issues were presented by the pleadings for determination by the trial court. First, the parties, through their duly authorized agents, made and intended to make a present contract of purchase and sale; this was evidenced by the four letters and by the confirmatory Donnelly-Kiefer letter. Second, the appellant was, at all times, ready, willing and able to perform its contract; there was no effective ban on exportation. Third, for the admitted breach of the contract, appellant is entitled to recover its damages. These three basic issues upon the extensive evidence produced before the trial court were all determined in favor of appellant. The meticulous examination of the evidence pro and con which has been made in the respective briefs filed has only served to demonstrate, beyond peradventure of a doubt, that the

factual determinations so made by the trial court were eminently warranted. The great weight to be accorded unto the decision and findings of the trial court are too well settled to require citation. Suffice it to say that, in every respect, there is ample evidence to sustain the Findings and Decision on the three basic points.

Bearing in mind the great weight to be given to the Findings and Decision, appellant has, nevertheless, pointed out that there was no evidence to sustain the factual finding as to the market value of glucose, in September, and the existence of two markets, one for export and the other for domestic use, nor that the negotiations between the parties did not contemplate liquidation through orderly operation of the contract. But these are points comparatively minor to the three basic findings above noted.

Two serious errors of law constitute the gravamen of this appeal. First, the fixing of June 6th as the date upon which damages must be determined; and, second, the refusal to give confirmation to the rate of exchange agreed upon by the parties in their contract. Full coverage of these points has been made in the opening brief.

Disingenuous, indeed, is appellee in its introduction of irrelevant points pursued in its evident strategy to complicate the truly simple and plain issues of the case at bar. It is to restore the true viewpoint, before tersely noting the errors in appellee's present brief, to which this is a reply, that this restatement has been made. Reply to the Brief of Appellee in Answer to Brief of Appellant will now be made in direct order as therein stated.

For brevity, incorrect factual statements are collated in the appendix; reference is then made through Appellant's Opening Brief to full transcript citations.

Reference for reply to Appellee's Brief, headings I, II, and III, being Preliminary Statement, Statement of Pleading and Jurisdiction, pages 1 to 4, is made to Appellant's Opening Brief, pages 1 to 16.

ARGUMENT.

Answer to the Argument in appellee's brief will be made in accordance with the headings in that brief, with the certain inclusions of answers to its statement of facts. The confused argument of appellee requires certain segregations which will be noted under each heading.

A. The Market and Measure of Damages.

In the review of appellee's brief there necessarily are included corrections as to the testimony therein given on the market price, pages 15 to 18, inclusive. The reason for this is that appellee confuses and relies upon this testimony in his argument on the Measure of Damages, which extended from pages 19 to 26, inclusive, with variations throughout his heading of Minimization of Damages.

1. The Governing and Statutory Rule for Damages.

Where there is no acceptance of goods and there is an available market, the damages are measured by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted. No assumption other than under this rule ever had been made, contrary to appellee's statements on page 20. However, if appellant had made such an assumption, it would have acted under excellent authority.

United States v. Benton Coal Co., 273 U. S. 337,
47 S. Ct. 351, 71 L. Ed. 670-2.

"Appellee was bound to deliver the quantity of coal covered by the contract. Failure of the sources referred to in the contract would not excuse it. In contemplation of law, it could have obtained the coal at market prices prevailing at the time when deliveries were required under the contract."

Never before, by argument or evidence, has appellee advanced its present theory; never was there even an offer of proof of the price of appellant's purchases in connection with market price; never after May was appellant interested in glucose purchases. It had purchased the entire quantity prior to the repudiation notice. It is a trivia to state that market price is that at which a willing seller will accept and a willing buyer pay. Therefore, evidence of market, whatever the words of the witness, necessarily involves both such a seller and such a buyer.

Packing Co. v. Sunland Sales, Ass'n, 100 Cal. App. 126-133, 279 Pac. 1036.

“ ‘Market price means the current price.’ ‘Market price’ and ‘market value,’ when applied to any article, mean the same thing. They mean the price or value of the article established or shown by sales in the way of ordinary business. ‘Market value’ is the price at which goods are freely offered in the market *to all the world.*’ ”

Estate of Spitly, 124 Cal. App. 642-5, 13 P. 2d 385.

“In *Phillips v. United States*, 12 F. 2d 598, the court defines fair market value ‘to be the value of the property in money as between one who wishes to purchase and one who wishes to sell, the price at which the seller is willing to sell at a fair price and a buyer willing to buy at a fair price, *both having reasonable knowledge of the facts.*’ (Italics ours.) In *Heiner v. Crosby*, 24 Fed. (2d) 191, the court says: ‘Sales made at a particular time and place may be significant, but the price paid is not necessarily decisive of fair market price or value. The fact of sales, in itself and without regard to the circumstances under which the sales were made, does not conclusively establish either statutory fair market price or value. Sales made under peculiar and unusual cir-

cumstances, such as sales of small lots, forced sales and sales in a restricted market may neither signify a fair market price or value, nor serve as a basis on which to determine the amount of gain derived from the sale.' ”

2. The Glucose Market in August, 1946.

The condition of the market during August comprised the extent of the testimony of Mr. Berger, to which appellee lays great stress. The testimony, as noted by appellee, is of course, a correct quotation, but it has an entirely different aspect when set into the context and, indeed, falls far short of the reach which appellee claims. During this month, the testimony establishes that there was, in fact, no market; that the range of prices which he states of 1.23 to 1.25 pesos was merely a range of asked prices, with no buyers. That, however, is no market under the clear definitions of “market” in the preceding sections. The evidence given shows a mere asking price, with no takers. [R. 353.]

“Q. The export price on Argentine glucose was \$1.23, that is, one peso and 23 centavos to one peso and 25 centavos in the month of August of 1946, was it not? A. That would be a little bit difficult to know the exact money when that happened.

Q. I asked you about that in your deposition. Do you recall it? A. Yes. It could be because at that time the price situation was more or less nominal.

Mr. Bronson: If it is not objectionable to you, I will read this and you can tell me if it is a correct statement. I am reading from page 102 of the deposition. You can follow me here if you prefer.

Mr. E. B. Stanton: All right.

Q. On August 2nd, on the next to the last page, that is the page immediately preceding one that contains your signature, we were referring to that let-

ter, in the third from the last paragraph reading [Testimony of G. Fred Berger]: 'In view of the fact that the Government just at this time has been delaying the issuance of export permits in its fight to reduce the local cost of living, there has been practically no activity in the glucose market which has remained steady at 123-125.' A. Yes; that was the nominal market because of recent activity on the market.

Q. Well, that was the market in any event? A. It was the nominal market.

Q. Let us put it this way: The market is made up of quotations, isn't it, on the exchange where the commodity is handled? A. Mr. Bronson, a market is made up wherever it is, sometimes on active quotations, sometimes on bid and asked when there is only nominal activity. This happens to be nominal activity and it is in effect a bid and asked quotation, 123-125 being the asked quotation.

Q. That would mean that that was the asked quotation— A. That is right.

Q. —or the lower one was the bid— A. 123-125 was—

Q. If you will excuse me—and the higher, the asked quotation. A. That is not bid and asked."

"Q. (By Mr. Bronson): All right, and there was no other market on export glucose than that particular figure set in the manner you have described, is that true? A. That is true.

Q. Now, isn't there, in fact, a difference between your domestic bulk market on glucose and the export market? A. Yes, that is quite right.

Q. And you were talking and you intend now to testify that this figure that I just read to you—that range of figures applies to the export market, correct? A. That is correct."

Mr. Berger also stated in the talk with Mr. Heymsfeld on September 5th, that the market was between 1.08 and 1.10 pesos. This statement, as developed in the opening brief, page 59, referred to a price prior to August 24th.

In August, there were no sales. The reason for this lack of sales is clear. According to the testimony of Mr. Lang [R. 967], the Argentine government, on June 16th proclaimed a campaign to reduce the cost of living. No new export licenses were granted until the order of August 29, 1946. Such is in accord with the above-quoted testimony of Mr. Berger. The testimony of the market witnesses produced by appellant are all to the same effect.

Polastri [R. 526]:

“Later (after July) the market fell, with no possibility of doing any business. In my opinion the prices during the period July 1946 and May 1947 went down to such an extent that in order to make a sale it was necessary to have a vendue, in which only a price of about 0.20 centavos Argentine currency per kilo could be obtained.”

Lang [R. 536]:

“May and June 1946: pesos 1.15 to 1.22 per kg; July, August, September, practically no operation.”

Lang [R. 541]:

“In my own opinion the prices were in May 1946, 1.15 to 1.22 for asked and 1.13 to 1.20 for bid; in the month of June, 1946 prices applied without any change. July, August, September 1946, no sales, no operations, no prices. October 1946, 61 to 62 centavos; November 1946, 61 centavos, December 1946, 60 to 61 centavos.”

Lakatos [R. 555]:

“May Pesos 1200.—per 0/00 kg. after which date, prices remained stationary, without business, as the trade was waiting for regulation of exports by the new Peron government, dedicated at that moment to a campaign for reduction of the cost of subsistence, and there were no new export permits forthcoming, although permits for sales up to the end of May have been conceded and these were exported accordingly.

This situation was resolved by September 1946; but by that time the international market for corn syrup became weaker, competitors from U. S. A. started offering at prices lower than Argentine producers were asking; the more so, as in purchases by an outsider, the market went to unusual heights and speculators purchased all available quantities to be produced up to March 1947 at the then prevailing prices, viz.: Pesos 1200.—a ton.”

The statement of the above-quoted testimony of the Argentine market experts harmonizes with the testimony of Mr. Berger and again proves the error of appellee in its claim of two markets. The prices stated by Mr. Berger are in line with the various prices quoted by the Argentine market experts (Op. Br. p. 57). The undoubted solution is that all of the purchases by appellant were made on f.a.s. contracts. Mr. Berger, in giving his testimony, included the f.a.s. cost of 10 centavos. If 10 centavos is deducted from the asked price of the Berger testimony, of 1.23-1.25, it harmonizes precisely with the figures given by Mr. Dittisheim for June and July and with the price of Mr. Polastri for June. These June prices doubtless prevailed as asked prices on a market where there was no bid.

The export prices, as the testimony of all witnesses held, are and were, throughout the whole contract period, merely the difference between the market price and the cost of transferences to F.O.B. ship. This involved an invariable addition of 15 centavos to the market price. No foundation appears for the statement of appellee that the market price involved in this contract is anything different from the fair market price plus the cost of transference on board ship. In fact, the whole proof supports the last statement made. Therefore, the statement of appellee in this respect is simply incorrect, as is the statement that the evidence shows a cost of performance. No element of the cost of glucose has, at any time, been stated in the evidence or otherwise. The cost of transference to F.O.B., in addition to the market price are directly authorized by the authorities cited in Opening Brief, page 64.

3. Authorities of Appellee.

The selection of authorities by appellee, under this heading, is most unfortunate, in that none of them justify the broad statements made.

Boston I. & M. Co. v. Rosenthal, 68 Cal. App. 2d 564 does not justify the statement that California law requires proof of export prices in order to secure damages. The Court here was passing upon conflicting evidence as to damages due, and stated (p. 572):

“The only question is whether there is evidence sufficient to support the \$13 figure. We are satisfied that there is.”

S. P. Mill Co. v. Billiwhack S. F. L., 50 Cal. App. 2d 79.

This case was decided on the rule of Civil Code 3353, instead of the prevailing Sales Code provision Civil Code Section 1784. The testimony upon which market price

was based included a profit to plaintiff of 75¢ per ton. The Court merely held that no evidence of market value or market price had been given.

Lineman v. Schmid, 32 Cal. 2d 204.

This case is a third in the series of *Rice v. Schmid* cases. It is applicable, in no respect, to the case at bar.

Upon this review it appears that appellee's statements are generally based upon incorrect statements of the evidence and improper inferences to be drawn from the evidence. A review of the facts definitely establish that Mr. Berger did not testify to any market value or price. In fact, he definitely stated that he was not qualified to answer any questions of differences with respect to export prices or export markets and that his organization was, in no respect, concerned therewith [R. 357]. The proof establishes that there was one market. This market broke the latter part of June and little or no activity appeared thereon until September.

B. Mitigation of Damages.

The defense of mitigation of damages is without avail in the case at bar, for several reasons. It is an affirmative defense and was not pleaded. It was not raised in the Trial Court. There is no finding thereon, nor was any requested. Appellant, in its negotiation, did all that it could to mitigate damages. Any action of appellant in placing the 1135 tons on the market would have enhanced the damages. Appellant, in its conduct, wisely aided and acted toward mitigation of damages. Coverage is here made of appellee's brief, pages 27 to 38.

1. The Defense Was Not Pleaded.

The Eighth Federal Rule of Procedure, Sec. C, provides that a defendant shall affirmatively set forth, in his answer, various named defenses "and any other matter constituting an avoidance or affirmative defense." This rule has had a broad interpretation, including therein defenses based on election of remedies and custom, agency and bona fide purchases.

Bagwell v. Susman, 165 F. 2d 412;

Roth v. Swanson, 145 F. 2d 262;

U. S. v. 673 Cases, 74 Fed. Supp. 622.

2. Appellee's Cases Do Not Bear Out Its Claims.

The Federal cases cited were all decided prior to the enactment of the Federal Rules of Procedure. They were likewise all decided prior to April 25, 1938, the date of the decision in *Erie v. Tompkins*, 304 U. S. 64.

Crane Iron Wks. v. Cox & Son, 28 F. 2d 328.

This was decided September 26, 1928. It was a second appeal. The prior case was decided April 28, 1925. The prior case states the facts and shows that mitigation of damages was pleaded and the issue there raised. The Court states in *Cox & Son v. Crane Iron Wks.*, 5 F. 2d 314:

On March 15, 1921, some 3½ months before the contract delivery date the Iron Works brought suit based on a repudiation of date December 21, 1920. The Court held that plaintiff had elected to sue on the anticipatory breach rather than await the contract term. The pleadings raised the issue of mitigation. The trial court, nevertheless, refused to admit evidence of market value at the time of the breach sued upon and for this reason reversal was made.

In the second trial under the pleadings, defendant submitted evidence to the effect that plaintiff, at all times, was manufacturing and selling iron, had not appropriated the iron to this repudiated contract and if it had so done, the loss would be less than prayed. This was sufficient for the decision. Whatsoever was stated, and which appellee quoted, under the doctrine of *Erie v. Tompkins*, would not now be law. In any event, mitigation was here pleaded.

Samuels v. Drew & Co., 286 Fed. 278 and 292 Fed. 734 decided October 24, 1922. Not the law of sales or damages was the criterion of decision in these cases, but the nature and effectiveness of claims against an equity receiver. The contract provided for deliveries over a five month period. Prior to the last delivery receivers were appointed and in charge. They elected not to adopt the contract. The statement cited by appellees was *dictum* in that the actual decision held:

“To constitute a provable claim against assets administered by a Court through receivership proceedings, it must be in existence at the time of the appointment of the receiver. The reason for this is, when a Court of Equity appoints receivers for an insolvent estate, it takes control of the assets and property of the estate for the benefit of all existing creditors. A fund is thus created to be administered for all creditors and to be charged with the obligations in favor of all existing creditors.”

United States v. Harris, 100 F. 2d 268.

The election of the injured party to require compensation at the time of the anticipatory breach or subsequent thereto is the sole holding of this case. It is the injured party and not the injuring one who can control.

Lillis v. Western Fruit Growers, 44 Cal. App. 2d 826, 113 P. 2d 267;

Baylis v. Kingsholm Co., 5 Cal. 2d 68,

cited by appellee (p. 34) are both cases where the seller made resale under the provisions of Section 1783, Civil Code, hence they do not apply to this case. Resale such as in these cases made establishes the market price. The market price thus established is not as of the date of repudiation, but of the resale.

The New York cases cited (p. 33) are all lower court cases. They must bow to the controlling case of *Segall v. Finlay*, 245 N. Y. 61, 156 N. E. 97, later stated.

3. The Affirmative Defense of Minimization of Damages Was Not Raised in the Trial Court.

It is the general rule of Appellate Courts that they do not consider any issues which are not presented to the trial court. The remarks made by appellee that there was evidence which required the trial court to find that plaintiff was bound to sell or immediately thereafter mitigate damages (page 34), or that made on page 37 to the effect that the Court made any finding that the plaintiff acting as a private person should have disposed of the goods in June, 1946 is simply incorrect. There were no findings to any such effect and there was no evidence produced to sustain any position or remarks such as those made. The fact of the matter is that this issue was never raised in the trial court, either by evidence, by plea, or by argument. The trial court never had any opportunity of passing on this alleged defense. There was no finding thereon, nor was any finding requested.

4. The Burden of Proof of Mitigation Is on the Party Asserting the Issue.

“The overwhelming weight of authority is to the effect that in actions for damages arising out of either breach of contract or tort, the burden is on the party whose wrongful act caused the damages complained of to prove anything in diminution of damages or, in other words, that the damages were lessened or might have been lessened by reasonable diligence on the part of the aggrieved party.”

The foregoing quotation is quoted from the Summary of an extensive Annotation on the Burden of Proof and Mitigation of Damages, contained in 134 A. L. R. 243.

It is clearly evident from the annotation and from the quotations from the cases as therein stated that the weight of authority throughout the United States squarely places the burden of proof of mitigation upon the party asserting such an issue. Therefore, it follows that the burden of pleading such issue is placed upon the party claiming to assert it. Unless such issue is raised by the pleadings, the plaintiff would have no notice in order to permit it to prepare for trial, and produce the necessary counter-vailing evidence.

It is to be noted from the above-cited annotation that New Jersey, where the Crane case cited by appellee arose, is among the states which hold to the majority rule, placing the burden of proof upon the party asserting the issue. So, also, holds New York. California is among the states with numerous decisions upholding the majority view. In fact, contrary to the view of appellee, it is the explicit rule in California that not only does the burden of proof

rest upon the party claiming mitigation of damages, but the party must allege such issue in its pleadings.

Vitagraph v. Liberty T. Co., 197 Cal. 694-99, 242 Pac. 709.

“When respondent proved the contract, the performance thereof by the delivery of the third and fourth films, and appellants refused to pay therefor, it established at least a *prima facie* case entitling it to recover as damages the amount which appellant had agreed to pay for the films (*Alderson v. Houston*, 154 Cal. 10). It was then for the appellant to prove facts in mitigation of those damages, and this it did not do. *It is generally held to be the duty of the defendant to plead the facts in mitigation of damages if he would rely thereon, and this the appellant did not do.*” (Italics added.)

Coke v. County of Sutter, 206 Cal. 445-55, 274 Pac. 750.

The *Vitagraph* case and the Restatement of Contracts, Sec. 336, state the unquestioned law that the seller is under a duty to minimize damages. That, in effect, is all that the Michigan Law Review article states, but it is no part of the case of the plaintiff to be required to show that he, the plaintiff, has actually minimized damages. When the plaintiff produces the contract and the breach thereunder, he has established a *prima facie* case. It is then the duty of the defendant to undertake the burden under proper pleading, to establish that the plaintiff could or should have done something which he had not done, under which damages should be minimized. This is the rule of such cases as *Crane Iron Works v. Cox & Son* and *Cox & Son v. Crane Iron Works*, cited and discussed, *supra*. It is the rule of the *Vitagraph* case. It is the settled California rule.

Segall v. Finlay, cited *supra* and later, is a case directly on all fours with the case at bar. It merits a careful reading by this Court for its full import.

February 28th, the contract was made for importation of sugar from Cuba to New York over a period of time. The buyer repudiated. Negotiations for settlement ensued. March 12th the seller accepted the fact of repudiation and thereafter brought suit. The buyer contended for the price on the date of repudiation and that the seller should then have sold. The Court held that under the New York version of the Uniform Sales Act that the seller was entitled to the difference between the contract price and the market price on the contract delivery date, stating "No one can reasonably contend that the goods ought to have been delivered either on February 28th or March 12th." This decision had the concurrence of Chief Justice Cardozo. The Court in this decision without naming decisions prior to the enactment of the Uniform Sales Act actually did hold contrary thereto. In effect it held that under the act there was no duty to mitigate damages. It is to be noted that mitigation was not expressly pleaded.

5. All That Could Be Done to Minimize Damage Was Actually Done by Appellant.

Within four days after the June 7th wire of Mr. Woolsey, the appellee, through Mr. Metcalf and his phone and wire of June 11th, undertook a plan to minimize the damages to appellee. The development of this plan is fully set forth in the Opening Brief, pages 28 to 33 and 42 to 47. There is outlined a practicable plan, in which appellee would join with appellant. It was a plan agreed upon by appellee through Messrs. Metcalf and Dichter. It was a plan that appellee itself abandoned by the very words of its secretary.

Indeed, there was a market for glucose in moderate quantities in Buenos Aires, in June, but news of the repudiation by appellee wrecked that market in the latter part of the month. The sworn evidence of all of the Argentine market witnesses conclusively proves that if appellant had thrown this glucose or any part of it upon the market, it could not have moved except at forced sale and then at prices of, possibly, 20 centavos per kilo. In other words, the market would have been entirely broken and practically nothing would have been realized. [R. 495, 506, 517, 527, 537; Exs. 60A, 60B, 60C, 60D and 60E.] In fact, as the depositions show, the suppliers themselves did not, in their dealings with appellant, throw any of the glucose upon the market. As it is stated, "it would have taken the bottom off the market." In effect, appellant did all that could be done to minimize damages. It held the glucose. It fought with its suppliers and finally arranged with the contract suppliers to repurchase the glucose from it. There is no finding that appellant should have disposed of the goods in June. There is no finding and no possible evidence that appellant was speculating on the glucose at any time. The definite evidence is that, in September, after knowledge that the appellee would not go through with the Dichter and Metcalf agreement, appellant searched the world for a market and was unable to dispose of any but a portion of the 400 ton oral contract glucose. No one can point out one single thing under the evidence and the conditions prevailing, which appellant could or should have done and failed to do. The efforts of the appellant in the disposition of this glucose for the benefit of all parties is entitled to commendation of the highest order.

C. The Breach of Contract to Purchase Commodities to Be Delivered in the Future Involves Payment of Damages in Accordance With the Statutory Rule.

Weird and eerie is the fact statement and argument presented by appellee under this head. It appears in its Brief, page 19, and extends from page 39 to 43. Should appellee consult a dictionary, briefs could be brief.

A definition of "Futures" (38 *Corpus Juris Secundum*, Sec. 1, p. 68, also 86g, p. 148):

"*Futures*. A term applied to contracts for the sale of margins or products for future delivery, in which either seller or buyer may elect to make or demand delivery of the goods agreed to be sold and bought, but where uniformly no such delivery is made, and final settlement is made by payment and receipt of the difference in price at the time of delivery from that prevailing at the time the sale was made."

Clearly the contract in the case at bar comes, in no wise, within the definition of futures. Delivery of the glucose was, at all times, contemplated by all parties. The evidence is clear that the glucose was actually manufactured and in the warehouse either of appellant or its contract suppliers. Some of the suppliers stated that it was in their storage at the time of taking their depositions in 1947. Fifty tons were on hand, ready for delivery by appellant in June. Nor is there one iota of evidence that there ever was any Buenos Aires market for trading in futures. In fact, the contrary is definitely shown. The proof is uncontradicted that there was no market for the 1135 tons of glucose, constituting as it did one-seventh of the Argentine glucose export.

The cases cited by appellee again do not bear out the broad conclusion stated.

Renner v. McNeff Bros., 102 F. 2d 664.

No evidence was produced as to values at the time of deliveries. The only evidence was of the value of contracts for future delivery at the time of the repudiation. The contract specified deliveries in the Fall of the years 1935, 1936, and 1937. Defendant repudiated in July of 1935. Suit was brought January 1936. Thereby the seller elected to have the damages assessed as of the repudiation, by which appellee desired to minimize its damages. Appellant was agreeable at every point. (Op. Br. pp. 28 and 42.)

Samuels v. Drew, 286 Fed. 278, as above noted, dealt with admissible claims in an equity receivership.

U. S. v. Harris, 100 F. 2d 268

dealt with the right of the injured party to elect the point at which the measure of damage must be applied.

Reference is made for a full decision to Opening Brief, page 21.

D. The Election of the Seller Has No Retroactive Effect.

Thorough consideration of this heading has been given in Opening Brief, pages 21 and 48, to which reference is made. This heading covers pages 43 to 49 of Appellee's Brief.

Under no stretch of a legal imagination can the June notices be held effective (Op. Br. p. 33). Appellant declined to accept them and insisted upon performance. The September 18th letter indicated a necessary course of action to handle the mounting glucose deliveries. It was in accord with Civil Code, Section 1783. However, the

glucose was actually, at all times during the contract, held by appellant and appellant was, at all times, ready, willing and able to perform up to the date of filing its action in January 1947. It is true that prior to September 18th there had been various contract violations by appellee, it had failed to furnish shipping on which to load the glucose; it had failed to pay or furnish the contracted letter of credit; it had failed to carry out the plan for orderly liquidation pending between the parties from June to September. Definitely the appellant had the right, under Section 1783, and in the words of the statute to "treat the goods as the buyer's." The seller would have the right, under its bailment to sell under the provisions of Civil Code, Section 1780. These actions all would be in harmony with the legal incidents of the contract, incorporating as it necessarily did into its terms the provision of law applicable thereto. There certainly was no "unequivocal acceptance" either on September 18th or until January 1947. It was on September 20th that appellee gave its first actual notice of repudiation. That notice was never acted upon or accepted. The clear statement of the September 18th letter was to insist upon retention of the contractual relation. Therefore, it could not be an acquiescence in a repudiation or anticipatory breach. Incorrect is the statement that the trial court found that appellant acquiesced in any breach, there is no evidence to sustain any such finding. In fact, appellant has and does wholly reject the entire views of the September repudiation notice.

Assuming, for argument's sake, that there was an acceptance by appellant of any repudiation or anticipatory breach, it follows not at all that such acceptance relates back to June 6th or 7th. We have noted (Op. Br. p. 36) that the June notices were ineffective for any purpose. We have noted (Op. Br. pp. 28 and 43) that appellee undertook to clear the June fifty ton delivery. We have

noted that, until September, negotiations were pending and undetermined for orderly liquidation. Until September 20th, the date of the first repudiation by appellee, the contract under every rule of law, was in full force and effect. Practically, by neither action nor communication, was there any acceptance of the September 20th repudiation notice. The rule as stated in the following authorities requires an "unequivocal acceptance." Even so, the contract, under the rule, continued until that date. Never was there any acquiescence in the repudiation, always a rejection of appellee's entire stand.

Robinson v. Raquet, 1 Cal. App. 2d 533-42.

Repudiation, or renunciation "is in the nature of an anticipatory breach before performance is due, but does not operate as an anticipatory breach unless the promisee elects to treat the repudiation as a breach and brings suit for damages."

Alderson v. Houston, 154 Cal. 1-12, 96 Pac. 84;

Walker v. Harbor B. B. Co., 181 Cal. 773-78, 186 Pac. 356.

17 *Corpus Juris Secundum*, Section 472 P. 978:

"At his option, the promisee may reject the repudiation of a contract, and on such election the contract continues in effect for the benefit and at the risk of each of the parties. The renunciation of a contract by the promisor before the time stipulated for performance is not effective unless such repudiation is unequivocally accepted by the promisee. If the promisee declines to accept the renunciation and continues to insist on the performance of the promise, as he may do, the contract remains in existence for the benefit and at the risk of both parties, and, if anything occurs to discharge it from other causes, the promisor may take advantage of such discharge."

Segall v. Finley, *supra*, expressly determined that the repudiation acceptance had no retroactive effect.

The authorities cited by appellee go no further than to uphold the right of election of the injured party to select the date at which damages shall be measured. Necessarily, if the seller counts upon an anticipatory breach as the basis of his cause of action, then the measure of damages to be taken is the market value at the time of breach. But in case the seller awaits the term of the contract, the measure of damage is that specified by the Statute and Restatement of Contracts.

E. The Contract Rate of Exchange Must Prevail.

Whatever induced the parties to write into their contract the rate of exchange at which the contract would be performed is immaterial under the pleadings. No lack of meeting of the minds such as fraud or mistake is alleged. The contract rate of exchange is binding upon the parties and upon any Court interpreting or enforcing that contract. The appellee does not even seek to avoid the contract promise. Whether or no the result of this contract rate benefits one party or the other is immaterial. It must be remembered that Mr. Donnelly, in his communication to Mr. Kiefer, considered it very favorable [R. 409; Ex. 58] as the contract rate, being in accordance with the pegged rate, would not be subject to fluctuation and "this means that the only variation in price that can occur will be in the freight rate, where there may be a slight difference."

Conclusion.

The thorough examination of the practical and legal issues raised has emphasized the preliminary statement that the issues in this case are clear-cut and simple. Bearing in mind these cameo-clear issues, the confused strivings in opposition fall as dross. The parties made a contract. Appellee, for its own purposes, with a falling market, broke that contract. It may not now avoid the inevitable penalty of that breach.

Respectfully submitted,

STANTON & STANTON,

By LOUIS B. STANTON,

Attorneys for Appellant.

MESIROV & LEONARDS,

Of Counsel.

APPENDIX.

THE FACTS.

Error in
Appellee's
Br., Page

- 7 1. The June 6, 1946 breach notice was ineffective and the sender lacked authority. (Op. Br. p. 36.)
- 7 2. The original complaint was superseded by the amended complaint filed August 4, 1947. [R. 18 to 28.]
- 8 3. Cable is correct, but was preceded by the June 5th cable. (Op. Br. p. 29.)
- 8 4. It was the day after receipt of the June 8th cable that Mr. Metcalf, on June 11th, sent the cable quoted. (Op. Br. p. 42.)
5. Several transactions are missing between the Metcalf cables of June 11th and the Berger cable of June 14th and the reports from appellant's counsel. (Op. Br. p. 29.)
- 10 6. Mr. Dichter was directly sent to Buenos Aires. (Op. Br. p. 30.)
- 11 7. The June 24th statement to Dichter was a Schenley inter-office communication as instruction to Mr. Dichter. Note: He was required to ascertain as to expert licenses.
- 11 8. The July 8, 1946 cable was sent only after careful examination made by Mr. Dichter. (Op. Br. p. 43.)
- 12 9. The statement that "no one on defendant's behalf ever agreed to this plan of liquidation" is incorrect, Messrs. Metcalf and Dichter both agreed. (Op. Br. p. 31.)

- 12 10. The cable quoted (July 8th) contemplated sales to third parties for the sole account of defendant by "orderly liquidation." (Op. Br. p. 31.)
- 13 11. The statement as to the facts of the negotiations is not in accord with the evidence. (Op. Br. p. 45.)
- 14 12. The rate of exchange was fixed by the contract between the parties. (Op. Br. p. 62.) Appellant would have received pesos at the rate of exchange specified in the contract. Any lesser rate, necessarily, would cause a loss.
- 15 13. There was but one market and one market price. (Op. Br. pp. 55-6.)
- 18 14. Mr. Berger did not testify as here stated. He actually testified [R. 354-5] referring to the 123-125 figures: "It was the nominal market." "That is not a bid or ask. That is the rate of the asked quotation at the time."
- 18 15. Appellant established, and the record abundantly shows, that the one market price, plus the cost of transfer to F.O.B. ship in Buenos Aires Harbor equalled the export price. This cost was a constant 15 centavos per kilogram. (Op. Br. p. 55.)
- 19 16. Glucose subject to future contract. This statement is wholly unsupported by any evidence whatsoever. In fact, it is contrary thereto. Fifty ton was for June delivery. It was purchased and physically taken into the possession of appellant. (Op. Br. p. 29.)

IN THE

United States Court of Appeals
For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E.
INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,
vs.

SCHENLEY DISTILLERS CORPORATION
(a corporation),
Defendant and Appellee,
and

SCHENLEY DISTILLERS CORPORATION
(a corporation),
Defendant and Appellant,
vs.

COMPANIA ENGRAW COMERCIAL E.
INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

FILED

REPLY BRIEF OF APPELLANT, JAN 17 1950
SCHENLEY DISTILLERS CORPORATION.

PAUL P. O'BRIEN,

CLERK

BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,

Mills Tower, San Francisco 4, California,
Attorneys for Defendant and Appellant,
Schenley Distillers Corporation.

Subject Index

	Page
Preliminary statement	1
Argument	2
A. The issue of Whipple's agency.....	2
B. There was no meeting of the minds of the parties to the terms of the alleged agreement.....	8
C. Plaintiff's inability to perform the alleged agreement..	16
Conclusion	21

Table of Authorities Cited

Cases	Pages
Albert Steinfeld & Co. v. Broxholme, 59 Cal. App. 623, 211 P. 473	8
Atkinson v. District Bond Co., 5 C. A. (2d) 738, 43 P. (2d) 867	16
Brooks Tool Mfg. Co., Ltd. v. Hydraulic Gears Co., Ltd. (King's Bench), 89 L.J.K.B. N.S. 263, 9 A.L.R. 1507.....	19, 20
H. Hackfeld & Co., Ltd. v. Castle, 186 Cal. 53, 198 P. 1041..	10
Kirk v. Culley, 202 Cal. 501, 261 P. 994.....	16
Nason v. Lingle, 143 Cal. 363, 77 P. 71.....	8
Salfield v. Sutter County Land I. & R. Co., 94 Cal. 546, 29 P. 1105	8
U. S. Trading Corp. v. Newmark Grain Co., 56 Cal. App. 176, 205 P. 29	10, 18

Codes

Civil Code of California:	
Section 2310	8
Section 2313	8
Section 2314	8

Texts

1 Cal. Jur. 777, 778	8
Restatement of the Law, Agency, Section 88.....	8
3 Williston on Contracts (Rev. Ed.), pages 2346 to 2348, 2464 to 2465	17

IN THE

**United States Court of Appeals
For the Ninth Circuit**

COMPANIA ENGRAW COMERCIAL E.
INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,
vs.

SCHENLEY DISTILLERS CORPORATION
(a corporation),
Defendant and Appellee,
and

SCHENLEY DISTILLERS CORPORATION
(a corporation),
Defendant and Appellant,
vs.

COMPANIA ENGRAW COMERCIAL E.
INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

**REPLY BRIEF OF APPELLANT,
SCHENLEY DISTILLERS CORPORATION.**

PRELIMINARY STATEMENT.

This is the reply brief in the appeal taken by defendant, Schenley Distillers Corporation, from the

judgment against it finding the existence of a contract between the parties, which could have been performed by plaintiff.

In answering defendant's opening brief on these points, plaintiff restated the "questions involved." Plaintiff's statement of the issues raised by defendant on its appeal is not correct. However, during the course of its brief, plaintiff does recognize the points made by defendant, after rearranging the order in which they were made in our brief. For the purpose of this reply, we will discuss plaintiff's brief in the order adopted by it.

ARGUMENT.

A. THE ISSUE OF WHIPPLE'S AGENCY.

Plaintiff first discusses the question of Whipple's status, and argues that he was plaintiff's agent; that he was not, as we contend, acting independently and as a principal.

Plaintiff in its brief states, rather extravagantly, we believe:¹

"Nowhere in the evidence is one single thought shown in the minds of any of the parties but that the contract was between the parties to the action."

In addition to the evidence to the contrary set forth on pages 55 to 64 of our opening brief, Mr. Louis B. Stanton, counsel for plaintiff, himself wrote defendant

¹*Answer to Opening Brief of Appellee*, p. 7.

on June 24, 1946 (a month after the contract was alleged to have been made), stating:²

“June 24, 1946

Schenley Distillers Corporation
Empire State Building
New York, New York

Attention: Mr. Metcalf

Gentlemen:

In respect to the contract between *yourselves*, on the one part, and *Compania Engraw Comercial & Industrial S. A.* and *Harold A. Whipple* on the other part, for glucose to be shipped from Argentina:

We have today reviewed the entire correspondence, letters, cables and telephone conversations; with this in view, the writer today phoned to Mr. Berger at Buenos Aires, and as a result of that telephone call and our former communications, we state as follows:

* * * * *

Yours respectfully,
/s/ Louis B. Stanton.”³

Mr. Stanton wrote this letter as counsel for, and agent of, both plaintiff and Whipple. If he and his clients have since changed their minds about Whipple's status as principal, they nevertheless may not claim that there was not a “single thought” that Whipple was acting other than as plaintiff's agent. There is not only the letter just above quoted, but

²Tr. p. 845; Defendant's Exh. R-3.

³Emphasis here and elsewhere unless otherwise noted has been added.

also the substantial evidence referred to in the opening brief.

Plaintiff argues that the parol evidence rule precludes our challenging the existence of this alleged agreement between plaintiff and defendant. This rule has no application to the point made by defendant.

Parol evidence may not vary the terms of a written agreement, but it has no application to the question as to whether a given writing *constitutes* a legally binding agreement. Plaintiff's argument begs the question. In order to argue the parol evidence rule, it must be *assumed* that a contract exists. This assumption so made by plaintiff is one of the very issues on appeal.

In our opening brief, on pages 55 to 64, we set forth the evidence which we contend shows that Whipple was dealing as principal, not as plaintiff's agent. No specific answer is made to these facts.

It is true, as plaintiff states, that defendant did not intend to contract with Whipple. The point is, however, that Whipple continued to deal with plaintiff *as principal*. For example, his "acceptance" or "confirmation" of 1300 tons on May 20, 1946⁴ was not based upon any offer or acceptance by defendant; his acceptance on May 21, 1946⁵ of 600 tons and the "balance as available" was equally his independent act, and was not based upon nor did it create any agreement between the parties to this action; and the

⁴Tr. p. 157; Defendant's Exh. "A".

⁵Tr. p. 161; Defendant's Exh. "C".

altering of plaintiff's cable to him (i.e. deleting the words, "subject prior sale") was not the act of an agent transmitting offers of his principal.

Even though defendant intended to contract, if at all, with plaintiff, nevertheless plaintiff and Whipple dealt and continued to deal at arm's length, and the contract, if any was made, was between Whipple and plaintiff. The minds of plaintiff and Whipple met on a contract to purchase "up to 1300 tons" of glucose, which plaintiff commenced performing on May 21, 1946, when they agreed upon 600 tons and upon the "balance as available." (They later apparently agreed upon the sale of 1535 tons.) In the middle of *performance* of this agreement for 1300 tons, defendant wrote his letter concerning the 1135 tons. Plaintiff continued to act upon the basis of the 1300 tons agreement until defendant terminated negotiations on June 6, 1946. It then received all the correspondence, and plaintiff and Whipple promptly forgot the 1300 ton agreement (to which defendant was never a party) and pieced together a colorable claim that the only contract that ever existed was one for 1135 tons, made by plaintiff with defendant.

It is certainly clear that plaintiff thought that it had a contract with someone for up to 1300 tons. It is equally clear that no such contract was ever made by defendant. The written evidence shows that Whipple was necessarily the contracting party, for he had no purchaser when he accepted the 1300 ton offer. It is equally clear that *it was the 1300 ton contract*, at 1.30 pesos per kilo that *plaintiff was performing* when

it purchased the 1135 tons. Whipple, not defendant, was the purchaser under that contract.

The burden is upon plaintiff to establish the alleged agreement, and the parties thereto. It has succeeded in proving only an agreement with Whipple, relief from which it is seeking by the attempt to impose upon defendant a completely different contract from the one Whipple either entered into himself with plaintiff or led plaintiff to believe existed.

Plaintiff, on page 6 of its brief, states that we erred in claiming that plaintiff did not learn of the terms of the May 23, 1946, letter (the alleged contract) until after June 6, 1946. We repeat that such is the fact. Whipple did tell plaintiff the price at which he sold by a letter dated May 23, 1946, being forced to do so because the letter of credit was to be opened, if at all, in plaintiff's favor. However, all the conditions in the letter were unknown to plaintiff until after June 6, 1946.⁶

In support of its statement that Whipple advised plaintiff of the terms of defendant's May 23, 1946, letter before June 6, 1946, plaintiff points to defendant's Exhibit "F".⁷ That letter does *not* contain all of the conditions of the May 23, 1946, letter as a cursory comparison will show. Especially significant in this letter, however, is the careful perpetuation of the contract for *1300 tons, the contract earlier made by*

⁶Tr. pp. 191 to 192.

⁷Tr. pp. 165 to 166.

Whipple with plaintiff and the only contract ever made. *Whipple* stated:⁸

“We have in our possession a confirming letter from *Schenley* *authorizing us* to secure *up to 1300 tons* for them in accordance with *your* earlier offer.”

No such confirming letter exists, and no such authority was given *Whipple*. Here again we see the anomaly of *Whipple's* and plaintiff's position. He states here, with reference to the very contract alleged by plaintiff, that he is acting for defendant, in accepting plaintiff's offer.

The only attempt plaintiff makes to answer the facts we stated concerning *Whipple's* status is that *Whipple* necessarily took upon himself “great responsibilities”.⁹ We submit that *Whipple* had no right to assume the responsibility of making an agreement with plaintiff for or on behalf of defendant or, so far as the record shows, for anyone else except himself.

Whipple's acts, as agent or otherwise, could not properly be ratified by plaintiff after June 6, 1946. Because of the rule of mutuality of remedy and obligation, one party cannot be bound to a contract unless the other party is bound. In order for ratification to bind the third party therefore, it must be accomplished *before* repudiation, and as we have shown,

⁸Tr. p. 166.

⁹*Answer to Opening Brief of Appellee*, p. 8.

plaintiff did not know all the conditions of defendant's May 23, 1946 letter until after June 6, 1946.

Restatement of the Law, Agency, Sec. 88;
Albert Steinfeld & Co. v. Broxholme, 59 C. A.
 623 (211 P. 473);
Salfield v. Sutter County Land I. & R. Co., 94
 Cal. 546 (29 P. 1105);
California Civil Code, Sec. 2313;
Nason v. Lingle, 143 Cal. 363 (77 P. 71).

It has long been settled that a ratification is neither valid nor binding unless the party purporting to ratify knows all the material facts of the matter sought to be ratified and complies with the "equal dignities" rule.

California Civil Code, Sec. 2314;
 1 *Cal. Jur.* 777, 778;
California Civil Code, Sec. 2310.

The question and effect of Whipple's status is most clearly brought home by imagining the conclusive defense that could and would have been made by plaintiff (in the absence of the Statute of Frauds) had defendant sued plaintiff on this alleged contract.

B. THERE WAS NO MEETING OF THE MINDS OF THE PARTIES TO THE TERMS OF THE ALLEGED AGREEMENT.

On the question of whether the parties' minds met on the terms of any given contract, plaintiff devotes much of his time to two rules: (1) the knowledge of an agent is imputed to his principal; and (2) "the

form of the contract may be oral or written," if the statute of frauds is satisfied by an appropriate memorandum.

We have no quarrel with either of these rules.

On this point, we argue simply that no contract was created because the parties never agreed to the same terms; that there was never a specific acceptance of any given offer, and no point in the negotiations where both parties contemplated the same terms for any proposed sale. Plaintiff contents itself with the bare statements¹⁰ that our charge is "without warrant" and that "Definite was the agreement for quantity, 1135 tons; price 1.375 pesos per kilogram."

However, plaintiff does not, and cannot deny that it thought it had a contract for up to at least 1300 tons, and that it *actually performed* either this, or another imaginary contract of 1535 tons. Further, plaintiff did not know until *after* May 23, 1946¹¹ that the price was 1.375 pesos per kilogram.

Forgetting, for the moment, the necessity of a purchase order, the most weight that could be given defendant's letter of May 23, 1946, is that it was a counter offer. It was not an absolute and unequivocal acceptance; further, it varied the terms of the offer and was expressly conditional. Most important was the condition that delivery be made by plaintiff to McCormick Steamship Co.

¹⁰*Answer to Opening Brief of Appellee*, p. 11.

¹¹When it received Whipple's letter dated May 23, 1946. (Tr. p. 165; Defendant's Exh. "F".)

Plaintiff apparently admits, since it does not challenge, the materiality of this condition. It argues, however, that it was no part of the contract itself; that under the alleged contract, the duty was upon defendant to supply the ships for each delivery, and to engage space. Plaintiff makes this argument in defendant's appeal at the same time that it argues in its own appeal that it had the absolute right to make the monthly delivery on *any* day of the month that it chose.¹² These arguments conflict.

If defendant's letter of May 23, 1946, constitutes a contract, the burden would be upon plaintiff, the seller, to deliver the goods *on board* a McCormick ship. That is the entity defendant selected as agent for acceptance of deliveries and no other was authorized. Plaintiff's failure to agree to this limiting stipulation prior to termination of negotiations, is, apart from all other points, conclusive upon the contract issue.

That plaintiff's argument as to defendant's "duty" to provide a carrier is erroneous, is established by the following cases.

U. S. Trading Corp. v. Newmark G. Co., 56 Cal. App. 176 (205 P. 29);

H. Hackfeld & Co., Ltd. v. Castle, 186 Cal. 53 (198 P. 1041).

These cases also exemplify the materiality of the condition specifying the carrier.

¹²*Brief for Appellant* (Compania Engraw C.E.I.), pp. 53 to 54.

On page 16 of its brief, plaintiff states that it was "stipulated" that plaintiff had "full knowledge of the terms and wording" of defendant's letter of May 23, 1946. There is no such stipulation. Defendant did stipulate that on *June 6, 1946*, Whipple prepared and mailed to plaintiff a letter dated June 4, 1946.¹³ This is a far different stipulation than that claimed by plaintiff.

Plaintiff next discusses the point we make to the effect that the parties intended to contract, if at all, by purchase order and covering letter of credit. It takes the position that these documents were merely part of the "mechanics" of performance. If the letter of May 23, 1946, were intended to constitute the contract, the execution of a purchase order would be a purely idle act. A purchase order would, of course, have bound the plaintiff as well as the defendant, a situation which, because of the statute of frauds, does not exist if defendant's May 23, 1946, letter is a contract. If plaintiff is correct, it could have refused to sign the purchase order when received, and nevertheless could have held defendant to the alleged contract.

Plaintiff does not explain the facts set forth on pages 42 to 47 of our opening brief, upon which we base this point. It does not even refer to the cable from Whipple to plaintiff, in which, *five days after the alleged contract was made*, Whipple stated:¹⁴

*"Subject successful conclusion present negotiations, Schenley prepared negotiate 1947 production. * * *"*

¹³Tr. pp. 147 to 150.

¹⁴Tr. p. 134, Plaintiff's Exh. 9.

Only one conclusion can be drawn from the many expressions concerning and references to the purchase order, plus this admission that *negotiations* were still in progress on May 28, 1946, a time when a purchase order was *still* to be issued, but a time five days *after* the date on which plaintiff *now* alleges that the contract was made. No contract was made, or intended to be made on May 23, 1946, and any contract to be made would be created, if at all, by formal purchase order and covering letter of credit.

Plaintiff on page 29 of its brief, quoted testimony indicating that Donnelly did not discuss the purchase order with Whipple. The three lines quoted by plaintiff are misleading, out of their context. Donnelly's testimony actually is as follows:¹⁵

“Q. You never mentioned anything to Mr Whipple at any time about ever requiring the signature of Engraw for anything, did you?

A. No, sir; I did not.

Q. At that time, at least, you personally knew nothing about the issuance of letters of credit, did you?

A. May I qualify when you say ‘at that time,’ what date are you speaking of?

Q. I am speaking of the time of May 23rd and May 24, 1946. You were not familiar with the process yourself?

A. That is right; I was not familiar.

Q. You personally had the authority to sign that purchase order or any purchase order for that or any other amount right here on the Pacific Coast, didn't you?

¹⁵Tr. pp. 692 to 694.

A. Yes; I would say I have the authority.

Q. So there wasn't any reason for you to have to send this thing back to Cincinnati?

A. Is that a question?

Q. That is a question.

The Court. Yes.

A. The reason was that because sugar or glucose is something that I normally do not purchase on the West Coast. I prefer always having that handled in Cincinnati, our main office; and then, secondly, the amount was pretty large and I would prefer our head purchasing organization to handle the purchase order for \$600,000.

The Court. Let me inject a question. Did you inform Mr. Whipple of either or both of those reasons?

The Witness. No; I did not inform him of the reasons. No, sir.

The Court. *You merely told him that the purchase order would have to be issued?*

The Witness. *That is right.*

The Court. In the East?

The Witness. That is right."

And as to signatures Donnelly testified (Tr. pp. 698-699):

"Q. (by Mr. E. B. Stanton). You say you never advised Mr. Whipple at any time that you would require the signature of Engraw in South America to the purchase order or any other document, did you?

A. No; I did not personally advise Mr. Whipple of that.

Q. You did not direct anyone to advise him of that fact, did you?

A. I did not direct anyone. I just told Mr. Whipple that I would get a purchase order. A purchase order automatically requires a signature, as I said before, to complete the deal.

Mr. E. B. Stanton. I move to strike that last portion of the answer.

The Court. No. This is cross-examination. You can't argue without having an argument back with the witness. Besides, a glance at the order, I think, shows it is a purchase order. That instrument has become very well known in the last 10 years, especially since the war.

Mr. E. B. Stanton. I have no further questions.

The Court. All the purchases made by the Government during the war were by purchase order, all the purchases by the big companies, the aviation companies, during the war were made on that basis. And an examination of the blanks show that they call for a signature by both parties, otherwise that would be a unilateral contract."

Plaintiff also makes much of the fact that certain portions of the printed purchase order form are inapplicable to this transaction. The point is that no purchase order was ever prepared or issued covering this purchase. The parties knew that the agreement if made, would be made by purchase order, the terms of which were subject to review and agreement by them.

The point which defendant makes with respect to the purchase order assumes, for the sake of argument that the minds of the parties informally met upon

specific terms of a specific agreement, which was to be reduced to writing in the form of a purchase order.

Upon this assumption, depending upon the facts, one of two rules is applicable:

- (1) All the elements of a contract being present, the parties are bound, if the subsequent writing is meant to be merely a formalized memorial of the agreement (see cases cited by plaintiff); or
- (2) Even though all the elements of a contract are present, the parties are *not* bound until the agreement is reduced to writing if it is their intent that the agreement is not to be effective until so reduced to writing. (See cases cited in defendant's opening brief.)

Defendant contends that the facts recited in its opening brief show conclusively that this case is governed by the second rule above stated; that the parties intended to contract, if at all, only by purchase order and covering letter of credit. Indeed, only in this manner could both parties be bound, in view of the provisions of the statute of frauds.

Plaintiff, without reviewing the applicable facts, merely states and relies upon the first of the above rules.

We submit that the evidence is clear upon the point. Neither of the above rules is absolute: only one of them can apply to this case, and the question of which is applicable depends solely upon the facts.

C. PLAINTIFF'S INABILITY TO PERFORM THE
ALLEGED AGREEMENT.

It is a part of *plaintiff's* case, and it is its burden, to prove that it could have performed—that it was ready, willing and able to have performed—the contract, and would have done so but for the repudiation. Authorities establishing this to be the law are cited on pages 64 and 65 of our opening brief.

Plaintiff improperly pleaded *performance* of the contract, rather than that it was “ready, willing and able” to have performed.¹⁶ There can be no serious question but that the issue of ability to perform is raised under the general denial. Therefore, plaintiff's argument based upon the pleadings is irrelevant. Defendant pleaded the point affirmatively not because it must be raised in that manner, but because it wished to call court and counsel's attention to the Argentine laws involved. Those laws could have been relied upon to disprove or challenge the pertinent, affirmative portion of plaintiff's case, but defendant felt that the spirit of the new federal procedure, indicated that some notice of the grounds of defendant's denial in this connection would be more consonant with fairness.

In discussing the law relative to this issue, plaintiff confuses (as it did in the trial Court) the rule relating to the necessity of a plaintiff to prove his ability to have performed the contract upon which he sues, with the *defenses* of impossibility of performance and

¹⁶In California practice, this is held to be a fatal variance: *Kirk v. Culley*, 202 Cal. 501, at p. 506 (261 P. 994); *Atkinson v. District Bond Co.*, 5 C. A. (2d) 738, at p. 741 (43 P. (2d) 867).

“commercial frustration.” The latter two doctrines are not relevant to this case, but form the basis of plaintiff’s argument.

Defendant is not defending this action on the ground that *it* could not possibly have performed, or that *its* purposes were frustrated, and seeking, by one of these two defenses, to have the alleged breach excused. What defendant *does* contend is that plaintiff, in order to recover damages for breach of this alleged agreement, must show that it could and would have performed had defendant not breached, and that plaintiff has not satisfied this burden.

A person cannot recover damages for the alleged breach of a contract that he himself could not have performed, for he would otherwise be unjustly enriched.

3 *Williston on Contracts* (rev. ed.) pp. 2346 to 2348, 2464 to 2465.

Where, however, a party who is *able* and *willing* to perform sues another who cannot perform, the latter may seek to excuse his breach by the defenses of impossibility or frustration. These doctrines are matters of defense which relieve one who *cannot perform*, from paying damages to one who has shown he *could* have and wanted to perform. For example, if defendant had sued plaintiff for breach of the alleged agreement, defendant may have set up the Argentine prohibition as the basis of the defense of impossibility or frustration. Such defense may have relieved plaintiff from any obligation to pay damages, but it cer-

tainly does not *perfect* a cause of action in plaintiff's favor against defendant. Plaintiff's inability to perform would give defendant an option to either (1) waive the contract delivery dates and insist on later deliveries, or (2) terminate the contract. It would not, however, have been obligated to accept the later deliveries.

The case of *U. S. Trading Corp. v. Newark Grain Co.*, 56 Cal. App. 176, (205 P. 29) is quite clear on the point. The Court there stated (p. 190 to p. 191):

“As we have shown, the embargo, though it did not dissolve the contracts, worked a temporary suspension of them, to the extent, at least, that defendant could not be held liable for damages for nondelivery during the life of the embargo or while permits were not procurable. It is a fair inference from the evidence that permits were not procurable by either party during the term of the embargo. Defendant, therefore, until the embargo expiration, could not complete the performance of its contracts, nor could it be held liable for damages for nondelivery during that time. And, though it might have had the right to refuse to accept and pay for barley not tendered until after the expiration of the embargo (*Brooks Tool Mfg. Co. v. Hydraulic Gears Co.*, 89 L.J.K.B. (N.S.) 263 [9 A.L.R. 1507]), nevertheless, plaintiff, if it elected so to do, could hold defendant to a performance of its contracts after the embargo was lifted. That is, notwithstanding defendant's attempted anticipatory breach on October 7, 1919, plaintiff, at its election, could refuse to accept such attempted renunciation by

defendant of its contract obligations, could treat the contracts as subsisting, and could sue for a breach of contract after the time for complete performance had expired, i.e., after the termination of the embargo. (9 Cyc. 698; *Oppenheimer v. Brackman etc. Co.*, 32 Can. S. Ct. 699, 711.) *Because plaintiff, at its election, could treat the time when the embargo should be lifted as the time for completion of performance by defendant, the damages should be measured as of the date when defendant, after the lifting of the embargo, refused to make further delivery, which was November 12, 1919, the date adopted by the Court for that purpose."*

And in *Brooks Tool Mfg. Co., Ltd. v. Hydraulic Press Co., Ltd.* (King's Bench) 89 L.J.K.B. N. S. 33, 9 A.L.R., 1507, the Court said (9 A.L.R. at pp. 508 to 1509):

"In my opinion, the learned judge put the onus on the wrong party. It was not a question whether the defendants could establish justification for canceling the contract, but whether the plaintiffs could establish any reason for forcing the defendants to accept delivery after the delay. The County court judge has held that, because both the parties were controlled establishments, the contract must be altered, and a new term incorporated in it to the effect that, if the plaintiffs are prevented from delivering the goods at the date agreed upon, they can deliver later, and compel the defendants to accept and pay for them, provided that they can show that the delay is due to their having had to execute government orders. In my opinion that is an erroneous view.

We are not considering here the question whether the defendants could sue the plaintiffs for damages for delay in delivery, which would be an entirely different question; we are considering the exactly opposite question; namely whether the plaintiffs can demand payment for the goods in spite of the fact that they were delivered long after the time for delivery specified in the contract. If the county court judge was right, very remarkable consequences would ensue. The plaintiffs might deliver more than a year after the time agreed upon, and when the goods might be entirely useless to the defendants; yet the latter would still be bound to accept delivery and pay for the goods. Such a result would, in my view, be entirely unreasonable. In my opinion, therefore, the county court judge was wrong, and there was no ground for reading this new term into the contract. The appeal must be allowed."

The annotation in 9 A.L.R. 1509, following the report of the last cited case, sheds further light on this question.

Turning to the facts, in spite of the statement on pages 67 and 68 of our opening brief, plaintiff continues to ignore the difference between an *application* for, and the *issuance* of a permit. The expert witnesses were unanimous in pointing out that the various laws, orders and prohibitions did not affect *permits already issued*. It is also established without

conflict that no permit was ever issued to plaintiff. Exports could be and were made—even during the periods under consideration—under permits issued prior to the effective dates of the orders.

Plaintiff's expert witnesses also traveled this same narrow path between the acts of applying for and receiving a permit. Plaintiff, on page 41 of its brief, quotes, for example, its expert Dr. Padilla who said that there was no "*legal* obstacle to fulfill the contract in those months since an export permit could be *requested* from the government."

Of course, it is immaterial to this issue whether the act of the Peron Government, in refusing new permits, acted "Legally", or as an arbitrary dictatorship.

The question is not limited to whether the *law* prohibited exports; the question is whether *for any* reason plaintiff could not have performed. We believe that the evidence, as detailed in our opening brief, fails to support a finding that plaintiff could have performed this entire, indivisible contract.

CONCLUSION.

We demonstrated in our opening brief, that the evidence does not support the judgment, and that as a matter of law no contract was created between the parties to this action. We submit that plaintiff has failed to answer adequately our argument, and that

We are not considering here the question whether the defendants could sue the plaintiffs for damages for delay in delivery, which would be an entirely different question; we are considering the exactly opposite question; namely, whether the plaintiffs can demand payment for the goods in spite of the fact that they were delivered long after the time for delivery specified in the contract. If the county court judge was right, very remarkable consequences would ensue. The plaintiffs might deliver more than a year after the time agreed upon, and when the goods might be entirely useless to the defendants; yet the latter would still be bound to accept delivery and pay for the goods. Such a result would, in my view, be entirely unreasonable. In my opinion, therefore, the county court judge was wrong, and there was no ground for reading this new term into the contract. The appeal must be allowed.”

The annotation in 9 A.L.R. 1509, following the report of the last cited case, sheds further light on this question.

Turning to the facts, in spite of the statement on pages 67 and 68 of our opening brief, plaintiff continues to ignore the difference between an *application* for, and the *issuance* of a permit. The expert witnesses were unanimous in pointing out that the various laws, orders and prohibitions did not affect *permits already issued*. It is also established without

conflict that no permit was ever issued to plaintiff. Exports could be and were made—even during the periods under consideration—under permits issued *prior* to the effective dates of the orders.

Plaintiff's expert witnesses also traveled this same narrow path between the acts of applying for and receiving a permit. Plaintiff, on page 41 of its brief, quotes, for example, its expert Dr. Padilla who said that there was no "*legal* obstacle to fulfill the contract in those months since an export permit could be *requested* from the government."

Of course, it is immaterial to this issue whether the act of the Peron Government, in refusing new permits, acted "*Legally*", or as an arbitrary dictatorship.

The question is not limited to whether the *law* prohibited exports; the question is whether *for any* reason plaintiff could not have performed. We believe that the evidence, as detailed in our opening brief, fails to support a finding that plaintiff could have performed this entire, indivisible contract.

CONCLUSION.

We demonstrated in our opening brief, that the evidence does not support the judgment, and that as a matter of law no contract was created between the parties to this action. We submit that plaintiff has failed to answer adequately our argument, and that

the judgment appealed from should be reversed with directions to enter judgment for defendant.

Dated, San Francisco, California,
January 16, 1950.

Respectfully submitted,
BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,
*Attorneys for Defendant and Appellant,
Schenley Distillers Corporation.*

No. 12,261

IN THE

United States Court of Appeals
For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,
vs.

SCHENLEY DISTILLERS CORPORATION
(a corporation),
Defendant and Appellee,
and

SCHENLEY DISTILLERS CORPORATION
(a corporation),
Defendant and Appellant,
vs.

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

FILED

MAR 29 1950

PAUL P. O'BRIEN,

PETITION OF APPELLANT,
SCHENLEY DISTILLERS CORPORATION,
FOR A REHEARING.

BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,

Mills Tower, San Francisco 4, California,
*Attorneys for Defendant, Appellant and
Petitioner, Schenley Distillers Cor-
poration.*

Subject Index

	Page
Preliminary statement	2
Grounds for petition for rehearing	2

I.

Under the law as stated in the decision the uncontradicted facts require that damages be fixed as of September 18, 1946	3
Conclusion	7

Table of Authorities Cited

	Page
Williston on Contracts (Rev. Ed.), Sections 1334 and 1335	6

IN THE
United States Court of Appeals
For the Ninth Circuit

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellant,
vs.

SCHENLEY DISTILLERS CORPORATION
(a corporation),
Defendant and Appellee,
and

SCHENLEY DISTILLERS CORPORATION
(a corporation),
Defendant and Appellant,
vs.

COMPANIA ENGRAW COMERCIAL E
INDUSTRIAL S. A. (a corporation),
Plaintiff and Appellee.

PETITION OF APPELLANT,
SCHENLEY DISTILLERS CORPORATION,
FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

PRELIMINARY STATEMENT.

Cross-appeals were taken in this case, and the decision of this Honorable Court was adverse to petitioner in both appeals. While petitioner believes its appeal was meritorious, this petition will not be devoted to a reargument of the points there raised, for it appears settled that a petition for rehearing cannot properly be so used. However, with respect to the question of damages (the issue raised in Engraw's appeal) this Honorable Court overlooked a fact which, under its own decision, requires a result totally different from the conclusion reached.

The sole purpose of this petition is to call the Court's attention to this important, uncontested fact adduced by Engraw itself.

GROUND'S FOR PETITION FOR REHEARING.

Petitioner respectfully urges that this Honorable Court order a rehearing in this case or modify its opinion because, under the law stated by this Honorable Court, damages can be assessed only as of September 18, 1946, because of the fact, which the Court overlooked, that on that date Engraw in writing unequivocally acquiesced in Schenley's repudiation.

I.

UNDER THE LAW AS STATED IN THE DECISION THE UNCON-
TRADICTED FACTS REQUIRE THAT DAMAGES BE FIXED
AS OF SEPTEMBER 18, 1946.

Petitioner argued, in support of the award of damages, that where an executory installment sales contract is repudiated by the buyer, and the seller acquiesces in the repudiation, damages are fixed as of the date of such acquiescence.¹

Engraw never challenged this rule as such, but denied its application to this case, arguing that it did not acquiesce *on June 6, 1946*.

The opinion shows that this Honorable Court is also in agreement with the rule as such.

The question before this Honorable Court then, was one of fact: Did the evidence support the finding that Engraw *on June 6, 1946*, acquiesced in Schenley's repudiation?

The Court held that Engraw did not acquiesce on June 6, 1946. For the purposes of this petition, that holding must, of course, be accepted.²

¹This of course does *not* mean that the contract is at an end in the sense that it has been cancelled by mutual consent. It merely means that neither party contemplates performance of the contract. The seller, by his acquiescence, relieves himself from further responsibility for deliveries, and deprives the buyer of the right to withdraw his repudiation and accept performance. In either event, of course, the injured party has his action for damages.

²It would seem, however, and the trial Court found, that negotiations for the purposes of liquidating the agreement and any liability of Schenley, and the performance of the alleged agreement as made, are necessarily inconsistent.

However, this Honorable Court did not thereupon consider or note the fact that Engraw *did unquestionably* acquiesce on September 18, 1946, by a letter which it pleaded, and which was called to the attention of this Honorable Court in the briefs. The opinion erroneously assumes that June 6 was the only date on which an acquiescence could have been made, and it proceeded, apparently, to *bind* the trial Court to fix damages "by the difference between the contract price and the market value of the glucose at the times when Schenley was required to take delivery".

Two dates were before the trial Court as independent dates on which Engraw acquiesced, and the trial Court made findings relative to *both* dates.³ In overlooking the second date (September 18, 1946) the Court created a basic contradiction in its opinion which it is impossible for the trial Court to resolve. The opinion adopts the rule relating to acquiescence and then appears to direct a measure of damages which, under the admitted facts, *conflicts* with the law *stated in the opinion*.

If, by its opinion, this Honorable Court meant to preclude the trial Court from considering any date other than the delivery dates *as fixed in the contract* we respectfully submit that it fell into error by overlooking:

1. Engraw itself established that on September 18, 1946, it did acquiesce in the repudiation. It did this

³Tr. pp. 65, 66.

by pleading (Exhibit "B", Amended Complaint)⁴ and proving that on that date it notified Schenley, in writing, that it was no longer holding the glucose for deliveries under the contract but would sell it elsewhere and look to Schenley for damages, if any.

2. The trial Court specifically found the market value as of September 18, 1946,⁵ on the theory that if there was any doubt as to whether Engraw acquiesced on June 6, 1946, there could be no doubt but that it did so in writing on September 18, 1946.

Exhibit "B" to Engraw's Amended Complaint is a copy of a letter dated September 18, 1946, acquiescing in the renunciation of the contract, and notifying Schenley of its intent to demand damages. It reads (Tr. p. 28):

"EXHIBIT 'B'

Hotel New Yorker
New York, N. Y.

September 18, 1946

Mr. Ralph Heymsfeld
Schenley Distillers Corp.
350 Fifth Avenue
New York, N. Y.

Dear Sir:

This is to notify you that the suppliers with whom we contracted for the 1135 tons of glucose which we sold to your Company have finally refused to accept cancellation of the contracts. We are, therefore, proceeding to sell the glucose at

⁴Tr. p. 28.

⁵Tr. p. 66.

best prices obtainable and will, of course, look to you for payment to us of the difference between the prices thus obtained and the price at which you contracted to purchase the same.

Your truly;

Compania Engraw Commercial
& Industrial S. A.

By G. Fred Berger"

There can be no question but that this letter expressly negatives deliveries to Schenley, and that it is, therefore, an acquiescence to Schenley's repudiation.

Engraw there elects *not* to hold the goods for the contemplated deliveries to Schenley. It elects to forego its right to insist that *Schenley* take the goods and adopts, in lieu thereof, its cause of action for damages.

The law applicable to this situation is clear from the decisions cited in "Brief of Appellee Schenley Distillers Corporation", pages 44 to 49, and, indeed, from the decision of this Honorable Court in this case.

Such an election as made by Engraw in the September 18, 1946, letter is irrevocable. (*Williston on Contracts* (Rev. Ed.), § 1334 and § 1335.) It destroyed Schenley's right to withdraw its repudiation and request deliveries, it relieved Engraw of its obligation to stand ready to deliver, and it terminated the contract as to both parties, except as a basis for an action for damages.

The statement in the Court's opinion that "Nothing at all in the record indicates that Engraw acquiesced in the repudiation" is inadvertently incorrect.

Under the law accepted in the opinion, the fact of acquiescence on September 18, 1946, requires that damages be fixed as of that date.

Since the trial Court specifically found a market price for September, 1946, petitioner submits that this Honorable Court could and should direct entry of judgment in an amount based upon that finding.

CONCLUSION.

Schenley's appeal was decided but not discussed in the opinion. Since the decision implies consideration of the issues raised by applicant Schenley, we do not feel free to re-argue our points. We are compelled to state, however, that the points made were meritorious and substantially supported by the law and the record cited in support thereof. Indeed, a company of petitioner's size that regularly and intentionally contracted in a manner as haphazard as this alleged contract was created, and in a manner binding only upon it, could not long exist on the American business scene. We respectfully suggest to this Honorable Court that the summary dismissal of our position, and the statements on page 3 of the opinion⁶ which imply that such

⁶"* * * For experience teaches that seldom is a defaulting party inarticulate in the assertion of some plausible reason for default. And the most common of these excuses is that there was no contract at all! * * *"

position is a mere expedient and sham, are not merited.

Turning to damages, under the rule, accepted by the opinion, "*where the seller does not acquiesce in or accept the buyer's unilateral repudiation, market value at the time or times fixed for delivery in the contract controls in determining damages.*"

But the only fact determined by the opinion is that there was no acquiescence *on June 6, 1946*. The opinion overlooks the letter of September 18, 1946, pleaded and proved by Engraw (and discussed not only by petitioner, but by Engraw itself on pages 33 to 36 in its "Brief for Appellant"). This letter is a clear acquiescence by Engraw.

Petitioner respectfully submits that this Honorable Court should grant a rehearing or modify its decision either to itself fix damages, under the trial Court's findings, as of September 18, 1946, or to eliminate the direction to the trial Court which, under the admitted facts in the record, can be construed to preclude the trial Court from applying the law laid down in the opinion.

Dated, San Francisco, California,

March 29, 1950.

Respectfully submitted,

BRONSON, BRONSON & MCKINNON,
EDGAR H. ROWE,

*Attorneys for Defendant, Appellant and
Petitioner, Schenley Distillers Cor
poration.*

CERTIFICATE OF COUNSEL.

The undersigned, one of the attorneys for Petitioner herein, hereby certifies that the foregoing Petition is well founded and that it is not interposed for delay.

Dated, San Francisco, California,
March 29, 1950.

EDGAR H. ROWE,
*Of Counsel for Defendant, Appellant and
Petitioner, Schenley Distillers Corpo-
ration.*

No. 12262

United States
Court of Appeals
For the Ninth Circuit.

CLAUDE T. LINDSAY and MARTEL WILSON,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED
AUG - 5 1949

PAUL P. O'BRIEN,
Clerk

No. 12262

United States
Court of Appeals

For the Ninth Circuit.

CLAUDE T. LINDSAY and MARTEL WILSON,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Appeal:

Appellant's Statement of the Points on Which They Intend to Rely on.....	169
Certificate of Clerk to Record on.....	19
Designation of Record on.....	18, 171
Notice of.....	18
Appellant's Statement of the Points on Which They Intend to Rely on Appeal.....	169
Certificate of Clerk to Record on Appeal.....	19
Certificate of Reporter.....	120
Complaint for Breach of Contract.....	2
Conclusions of Law.....	16
Designation of Record on Appeal.....	18, 171
Findings of Fact.....	12
Findings of Fact and Conclusions of Law.....	12
Judgment	17
Memorandum and Order.....	9
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	18

INDEX

PAGE

Reporter's Transcript..... 21

Witnesses, Defendant:

Ferguson, Guy H.

—direct 148

—cross 151

Taylor, Allen F.

—direct 89

—cross 112, 152

Witnesses, Plaintiff:

Lindsay, Ray T.

—direct 64, 137, 161

—cross 78, 138, 162

—redirect 85, 165

—recross 166

Nickel, Thomas R.

—direct 33, 134

—cross 49

—redirect 63

Taylor, Allen F.

—direct 142

—cross 151

NAMES AND ADDRESSES OF ATTORNEYS

JOHNSON, HARMON, STIRRAT &

HENDERSON,

1400 Central Tower,

703 Market Street,

San Francisco, California,

Attorneys for Plaintiffs and Appellants.

FRANK J. HENNESSY,

United States Attorney,

Northern District of California,

Post Office Building,

San Francisco, California.

Before: The Honorable Dal M. Lemmon,

District Judge, sitting without a jury.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26236-S

CLAUDE T. LINSDAY and MARTEL WILSON,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR BREACH OF CONTRACT

The plaintiffs complain of the defendant and for
cause of action allege:

I.

That this action is commenced against the United States pursuant to and under authority of Act of March 3, 1875, Chapter 37, and amendments thereto (28 U.S.C. Sec. 41, Subd. 20) to recover a claim for damages against the United States of America in the amount of \$6,833.61, founded upon an express contract with the Government of the United States of America.

II.

That on or about the 15th day of June, 1942, the plaintiffs and the defendant entered into a written contract under which the plaintiff undertook to construct for the defendant a certain defense housing project at Benicia, California, and called and identified as Defense Housing Project CAL-4017.

III.

That in said contract it was provided among other things that the defendant would furnish for use by the plaintiffs in the construction of the defense housing project above referred to all dwelling unit plumbing fixtures; that the defendant has failed to perform such agreement on its parts as follows, to wit:

That the ordinary and reasonable construction and meaning of said provision in said contract providing that defendant would furnish all dwelling unit plumbing fixtures is that defendant was required to furnish said dwelling unit plumbing fixtures in such a manner that complete installation could be made of the fixtures in a single trip to each house; that the usual custom and good plumbing practice in the community where said contract was entered into and to be performed was for all plumbing fixtures in jobs as was involved in the contract herein alleged to be installed in a single trip to each house; that defendant failed to furnish said fixtures in such a manner that complete installation could be made of the fixtures on a single trip to each house, but to the contrary furnished such fixtures and parts and types thereof intermittently and piecemeal from about August 4, 1942, to on or about December 27, 1942, and directed plaintiffs to install said fixtures piecemeal as furnished; that in order for plaintiffs to perform said contract as directed by defendant it was necessary for plaintiffs to install said fixtures piecemeal as they were furnished

by defendant and to make numerous trips to each house; that plaintiffs notified defendant when said fixtures were delivered to plaintiffs piecemeal and when plaintiffs were directed to install said fixtures piecemeal as aforesaid that said failure to furnish said fixtures in the manner as required by said contract as aforesaid would result in damage to plaintiffs by increasing the cost of installation over that which would have been required had said fixtures been furnished by defendant in the manner required by said contract as aforesaid; that defendant, despite said notice, failed to furnish said fixtures as provided in said contract, and directed plaintiffs to proceed with the installation of said fixtures piecemeal; that plaintiffs thereupon did install said fixtures piecemeal as directed by defendant, in order to complete said contract as directed by defendant.

IV.

That by reason of said failure of defendant to furnish said dwelling unit plumbing fixtures as required by said contract, as aforesaid, but instead, furnishing said fixtures piecemeal, as aforesaid, plaintiffs were required to incur additional expenses over and above what would have been required had said fixtures been delivered as required by said contract as aforesaid; that said additional expenses were in the amount of \$6,833.61; that plaintiffs were thereby damaged by said failure of defendant to deliver said fixtures as provided in said contract in the amount of \$6,833.61.

V.

That the above-mentioned contract between plaintiffs and defendant provides that disputes concerning questions of fact arising under the contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty days to the head of the department concerned or his duly authorized representative; that in the meantime the contractor shall diligently proceed with the work as directed; that pursuant to this provision the plaintiffs did prior to the bringing of this action make formal claim to the contracting officer for the above-mentioned damages in the amount of \$6,833.61; that said claim was presented on or about September 10, 1943; that under date of April 19, 1945, the contracting officer ruled that the contractor was entitled to \$2,696.00 of said claim, but denied the plaintiffs' claim of the balance, to wit, \$4,137.61; that within thirty days of said decision of said contracting officer and on or about May 18, 1943, the plaintiffs appealed from said decision of said contracting officer to the head of the department concerned as provided in Article 15 of said contract above mentioned; that the head of the department concerned did refuse and fail to allow the full amount of plaintiffs' claim, but ruled plaintiff was entitled to only \$2,696.00 and refused to allow the balance claimed, to wit, an amount of \$4,137.61; that said decisions by the contracting officer and the head of the department as mentioned above in disallowing said claim in the amount of \$4,137.61 were unreasonable,

arbitrary, and unsupported by any evidence or facts whatsoever; that defendant has not paid and there is still unpaid the entire amount of said claim, to wit, the amount of \$6,833.61.

VI.

That the plaintiffs have performed all of the terms and conditions of said contract on their part to be performed.

VII.

That by reason of the aforesaid act of defendant in the breach of the contract above mentioned, plaintiffs have been damaged in the amount of \$6,833.61.

Wherefore, plaintiffs pray judgment against the defendant for the sum of \$6,833.61 and interest, for costs of suit, and for such other and further relief as to the court may seem just and proper.

JOHNSON, HARMON &
STIRRAT.

/s/ WILLIAM H. HENDERSON,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

Claude T. Lindsay, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to

matters therein stated on information and belief, and as to those matters he believes it to be true.

/s/ CLAUDE T. LINDSAY.

Subscribed and sworn to before me this 30th day of July, 1946.

[Seal] /s/ NEIL T. DUFFY,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 3, 1947.

[Endorsed]: Filed Aug. 1, 1946.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named and in answer to the Complaint on file herein, admits, denies and alleges as follows:

I.

As to the allegations of paragraph one defendant leaves matters of jurisdiction to the Court.

II.

Admits the allegations of paragraph II.

III.

As to the allegations set out in paragraph III of

said Complaint defendant admits that by the said contract it did agree to furnish all plumbing fixtures; denies that it did in the particulars alleged or at all fail to perform said agreement.

IV.

As to the allegations set out in paragraph IV of said Complaint defendant denies that it did as alleged or at all fail to deliver said plumbing fixtures; further denies that plaintiff has been damaged in the sum of Six Thousand Eight Hundred Thirty-Three and 61/100 Dollars (\$6833.61) or any sum at all.

V.

Admits the allegations set out in paragraph V of said Complaint, save and except the allegation that its refusal to allow the balance of said claim was as alleged or at all unreasonable and/or arbitrary and/or unsupported by evidence. In this connection defendant alleges that its decision through said contracting officer was intended to and would, if accepted, have compensated plaintiff fully for all additional costs incurred by plaintiff because of any delay in the delivery of materials by defendant, if any such there was.

VI.

Defendant admits the allegations contained in paragraph VI of said Complaint.

Wherefore defendant prays that plaintiffs take nothing by virtue of their Complaint on file herein

and that defendant be dismissed hence with its costs of suit herein incurred.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Asst. United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 31, 1947.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Plaintiffs seek to recover \$6,833.61 for breach of contract alleging that the failure of the defendant to furnish the plumbing materials in units for installation by plaintiffs' sub-contractor necessitated piecemeal installation with increased cost to plaintiffs in the amount sought in this action. It is admitted that failure to furnish the materials was excusable due to the material shortages occasioned by the war. Plaintiffs allege that piecemeal installation was necessary to complete the emergency housing as quickly as possible, and that it was ordered by defendant. Defendant contends that some of the work was done before it ordered piecemeal installation and that it is not liable for the added cost for that work.

In any event the matter was submitted to an arbitrator under the terms of the contract. The contract provides:

“Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.”

Plaintiffs followed this procedure and made a formal claim to the contracting officer who ruled that the plaintiffs were entitled to \$2,696.00 of the \$6,833.61 sought. Plaintiffs appealed to the head of the department who made the same decision. It is contended here that this decision was unreasonable, arbitrary, and unsupported by any evidence.

Arbitration is favored by the courts. By the contract plaintiffs agreed to a method of settling disputed facts, a type of arbitration. “It is well established that every reasonable presumption will be indulged to sustain an award, and that a court may not substitute its judgment for that of the arbitrators, or set aside an award for mere inadequacy in amount, unless it is so great as to indicate corruption or partisan bias on the part of the arbitrators.” *Firemen’s Fund Ins. Co. v. Flint Hosiery Mills, Inc.*, 74 F. 2d 533, 536.

That the arbitrators provided for by the contract herein are public officers or employees is immaterial as contracts containing such provisions are valid, "and the decision of the person named generally can be attacked only in the same manner as that of any other arbitrator." 43 Am. Jur. 813; Sweeney v. U. S., 109 U. S. 618; Goltra v. Weeks, 271 U. S. 536, 548.

The mere fact that the contracting officer and the head of the department did not follow the precise procedure that plaintiffs feel should have been used in arriving at the amount that plaintiffs were damaged by the delay in furnishing materials is insufficient for this court to set aside their award.

It is not necessary that findings be signed by the arbitrators. In re Connor, 128 Cal. 279; 112 A.L.R. 874n.

The evidence present is insufficient to show that the contracting officer and the head of the department acted so inequitably that this court would be justified in setting aside the award and granting damages in this action.

It is ordered that judgment be for the defendant; defendant to prepare findings of fact and conclusions of law in accordance with the local rule.

Dated: October 13th, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Oct. 13, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on Friday, October 17, 1947, and trial was had on said day and on October 20, 1947, before the court sitting without a jury; Johnson, Harmon, and Stirrat and William H. Henderson by W. Glenn Harmon and William H. Henderson appeared as counsel for plaintiffs and William E. Licking appeared as counsel for the defendant; and the court having heard the testimony and having examined the proofs offered by the respective parties and the cause having been submitted to the court for decision and the court being fully advised in the premises now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

That this action was commenced against the United States of America and arises pursuant to and under authority of Act of March 3, 1875, Chapter 37, and amendments thereto (28 U.S.C. Sec. 41, Subd. 20) to recover a claim for damages against the United States of America in the amount of \$6,833.61, founded upon an express contract with the Government of the United States of America.

II.

That on or about the 15th day of June, 1942, the

plaintiffs and the defendant entered into a written contract under which the plaintiffs undertook to construct for the defendant a certain defense housing project at Benicia, California, and called and identified as Defense Housing Project Cal-4017.

III.

That in said contract it was provided among other things that defendant would furnish for installation by plaintiffs in the construction of the Defense Housing Project above referred to, certain fixtures to be installed in said housing project. That said contract in this respect provided as follows, to wit:

Division D-15, Section 1:

“(e) Dwelling unit plumbing fixtures, as hereinafter specified, will be furnished by the Government and shall be set and connected by the Contractor. Fixtures for non-dwelling unit buildings shall be furnished, set and connected by the Contractor as hereinafter specified.”

Sec. 3. Equipment Not Included in Contract.

1. The following items of equipment will be furnished to the Contractor by the Government and shall not be included in this Contract:

- (a) Space Heaters.
- (b) Domestic Water Heaters.
- (c) Ranges.
- (d) Refrigerators.
- (e) Bathroom Fixtures: (Plumbing).
- (f) Medicine Cabinets.

- (g) Kitchen Fixtures: (Plumbing).
- (h) Lighting Fixtures."

That said contract was later modified to delete the medicine cabinets and lighting fixtures from the list of fixtures to be furnished by defendant.

IV.

That said contract further provided among other things that the plaintiffs should prepare and furnish the government with a list of said fixtures required and date of delivery to the project. That pursuant to said provisions, plaintiffs on or about June 26, 1942, signed requisition orders requesting delivery by the defendant by August 1, 1942, of all of the items of said fixtures to be furnished by defendant under said contract. That said fixtures and equipment were not delivered by defendant by August 1, 1942, as requested by plaintiffs but actual deliveries of all said items were spread over the time from August 12, 1942, to January 22, 1943.

V.

That custom and good plumbing practice in the community where the said project was to be constructed was that all of said fixtures should be installed in a single trip to each unit. That representatives of defendant were notified that such piecemeal installation would result in an increase in the cost. That defendant's representatives nevertheless ordered plaintiffs to install said fixtures piecemeal as they arrived. That plaintiff did install the said fixtures piecemeal as they arrived as di-

rected by defendant. That plaintiffs did all of said installation by sub-contract to E. H. Frick Plumbing Company on a cost plus basis. That plaintiffs paid \$13,047.27 to Frick Plumbing Company for the installation of said fixtures.

VI.

That Article 15 of said contract between plaintiffs and defendant provided:

“Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.”

That plaintiffs followed the procedure set out in the above Article and made a formal claim to the contracting officer for their excess costs in the amount of \$6,833.61; that said contracting officer ruled that the plaintiffs were entitled to \$2,696.00 of the \$6,833.61, that in further compliance with said provisions, plaintiffs appealed to the head of the department who made the same decision as the contracting officer; that plaintiffs in all respects performed all the acts and conditions of said contract on their part to be performed; that said Article

15 of said contract constituted an arbitration agreement between plaintiffs and defendant with respect to the plaintiffs' claim herein. That the method of calculating under Article 15 of the contract used by the contracting officer and head of the department resulting in said increase of \$2,696.00 and the determination by each of them was reasonable and was neither arbitrary nor capricious. That there was no such discrepancy or inadequacy between the amount sought and the amount allowed by the contracting officer as to indicate corruption or a partisan bias on the part of said contracting officer or head of the department. That the contracting officer and the head of the department did not act so inequitably so that this court would be justified in setting aside the award and granting damages in addition to the amount of the award.

CONCLUSIONS OF LAW

Upon the above findings of fact it is concluded that plaintiffs are entitled to judgment in the amount of \$2,696.00, only, the amount found due to plaintiffs by defendants by the said contracting officer.

Let judgment be ordered accordingly.

Dated: April 6th, 1949.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed April 6, 1949.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 26236-S-L

CLAUDE T. LINDSAY and MARTEL WILSON,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury on the 17th day of October, 1947, and trial was had on said day and on October 20, 1947; Johnson, Harmon and Stirrat, and William H. Henderson and W. Glenn Harmon and William H. Henderson appeared as counsel for the plaintiffs and William E. Licking appeared as counsel for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It is hereby ordered, adjudged and decreed that plaintiffs have judgment against defendant in the sum of \$2,696.00, with interest thereon at the rate of 7% per annum from January 4, 1943, until paid.

Dated this 6th day of April, 1949.

/s/ DAL M. LEMMON,

United States District Judge.

Entered in Civil Docket April 7, 1949.

[Endorsed]: Filed April 6, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Claude T. Lindsay and Martel Wilson, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 7, 1949.

JOHNSON, HARMON,
STIRRAT & HENDERSON.

By /s/ ROBERT H. JOHNSON,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 5, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now the plaintiffs and appellants herein and pursuant to Rule 75 of the Federal Rules of Civil Procedure designates the record on appeal to

the United States Court of Appeals for the Ninth Circuit, as follows, to wit:

1. The pleadings of the parties.
2. The Findings of Fact and Conclusions of Law.
3. The Judgment appealed from.
4. The Notice of Appeal.
5. The Designation of Contents of Record on Appeal.
6. The Reporter's transcript of the evidence and proceedings.
7. It is requested that all exhibits be transmitted to the said Court of Appelas, together with the clerk's transcript.

Dated: May 13, 1949.

JOHNSON, HARMON,
STIRRAT & HENDERSON.

By /s/ WILLIAM H. HENDERSON,
Attorneys for Plaintiffs.

Received a copy of knowledge.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court
of the United States for the Northern District of

California, do hereby certify that the foregoing and accompanying documents and exhibits listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Complaint for Breach of Contract.

Answer.

Memorandum and Order.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Plaintiffs' Exhibits Nos. 1, 2, 3-A, 3-B, 4, 5, 6, 7 (Box of Records, contains 30 Folders, Payrolls, Weekly Payrolls 9-24 inc. Weekly Payrolls 1-30 inc. 47 pages Cost Accounting Breakdown), 8 and 9.

Defendant's Exhibit No. A.

Reporter's Transcripts—Vol. 1, Oct. 17 and 20, 1947; Vol. 2, Oct. 20, 1947.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of June, 1949.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 26236

CLAUDE T. LINDSAY and MARTEL WILSON,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. Dal M. Lemmon,
Judge.

REPORTER'S TRANSCRIPT

Friday, October 17, 1947—10:00 A.M.

Appearances: For the Plaintiffs—Johnson, Harmon & Stirrat and William H. Henderson, by W. G. Harmon, Esq.

For the United States—William E. Licking, Esq.,
Assistant United States Attorney. [1*]

The Clerk: Lindsay v. The United States.

Mr. Harmon: Ready, Your Honor.

Mr. Licking: Ready.

The Court: You may proceed.

Mr. Harmon: If the Court please, I shall make a preliminary statement at this time on the nature of this action. I understand, may I say at the outset, that we have only reserved this one day and we

* Page numbering appearing at top of page of original Reporter's Transcript.

want very much to complete it on this day. There is quite a mass of documentary evidence and much of it is very important, but rather than to take up the time in trying to read it into the record as the case goes in, because of the shortage of time, if it is all right with the Court, I just want to call attention to the fact that it is very important and there will be a brief summary of it and I will comment on our theory of the case in this opening statement, and then we anticipate and would like to submit the case on briefs, so that we can surely finish with the trial today.

The Court: Very well.

Mr. Harmon: Briefly, Your Honor, the situation is this: Back in 1942 the Government entered into a contract for the erection of certain housing over in Benicia, from 200-odd units, with the plaintiff in this action. They were to erect that housing unit at a total price of something like \$728,000. The contract was completed and construction was supposed to start early in 1942. [2]

The contract provided, among other things, that certain plumbing fixtures would be supplied by the Government and be installed by the contractors. It provided that the contractor should designate the time when the fixtures should be installed, or should be delivered for installation. It is what we call a mass purchase item which the Government apparently thought it could procure and supply better than the contractors could, and the whole contract was one of getting this housing completed as soon as possible.

The fixtures were requisitioned by the contractors for delivery August 1, 1942. They did not come at that time. There were various delays and the fixtures dribbled in in small quantities and none of them—I say none of them—at least most of them not complete, over a period of months running from October or maybe some of it was delivered earlier than that; anyhow, a period of months up into January. One fixture would arrive without parts for it, and sometimes some of the fixtures would come without any other fixtures.

The contract was entered into, of course, on the basis of mass building and with the idea that the contractor could install these materials quickly and enmasse, and keep his costs down in that fashion. Protests were made because of the failure to receive these, and requests were made for extensions of time, and then when the fixtures started to arrive, the persons representing the Government insisted that they be installed as [3] received—just as rapidly as received, even though not complete.

The contractors objected to that because it meant excessive costs and it was their plan to wait until all of the items had been received and then they could be installed in one group and the project finished. That was not satisfactory to the Government and its representatives, however. They were under pressure, apparently, for completed housing to be made available as rapidly as possible and they insisted that these items be installed as they came, regardless of how many came, regardless of the

completion, the completeness of the item that arrived, and at one time—at least one time and perhaps more than one—it was even threatened that if they didn't install them on that date, that the Government would put its own plumbers on and do the installation.

This resulted in overtime work, work late at night and early morning, on holidays and Sundays, at times that the contractors could not control, and at heavy expense, because of this overtime work.

The delays also ran them into the rainy season which complicated the matter, and at one time the roads were bogged down out there. It was a new project. The street work had not been finished, and at one time when some of these fixtures arrived the Government even refused to let them wait over the weekend until there might be a little dryness in the weather and they could get onto the project. [4]

These matters were pointed out to the representatives of the Government from time to time and they were notified that reimbursement would be expected. Early in the stage when the work was being completed, the correspondence will show that they asked for at least \$10 per unit additional cost because of that. None of the orders to install that stuff, as it appeared, were made in writing, although it was requested that these instructions be given in writing, and it is my understanding that that was promised. The promise was overlooked or was not kept, in any event, so that there is no written authorization at the time the work was involved to do this extra work.

In the early spring of 1943, the date of which will appear from the documents, formal demand was made, notice to the Government was made of the total cost. The cost had exceeded greatly the estimate that the contractor had put in his bid.

I might say in that regard, if Your Honor please, that the testimony will show that the reasonable cost of the installation of these units had they been received and installed in accordance with customary plumbing practice, at one time, would not have exceeded \$35 per house, or a total of somewhere around \$7,000; whereas, as a matter of fact, and in accordance with the claim filed by the contractor, the total cost to the contractor ran up to something in excess of \$13,000, making an excess in actual expenditure on labor to plumbers of around \$5900.

A claim was filed for that amount in accordance with the terms of the contract and to it was added a sum, I think 15 per cent, for the contractor's added overhead. The testimony will show that that was very reasonable and in fact it was an underestimate.

The testimony will show, too, I think, your Honor, that there are other damages that were occasioned which are not included in that claim, such as, for example, requiring these units to be installed piecemeal and in the worst weather, installed by plumbers going in, tracking over floors that had been finished and required refinishing by carpenters. None of that expense was put in the claim.

There was a conference held on that claim and

it was a lengthy conference, and at the end of it the contractor—the officers seemed to feel that it shouldn't be allowed and the contractor said, "What will you allow?" and they suggested that they would approve an allowance of \$3,000, and he, in order to get the matter behind him, said, "All right. We will submit a claim for that amount." So an itemized claim was again submitted, showing the total amount and then the willingness to accept \$3,000. That was approved by the officers in the immediate charge of the project and sent on to, I think, the San Francisco office, for processing.

There it was turned down and no money was paid to the contractor as a result. [6]

When the matter was turned down, in accordance with the terms of the contract, the contractor filed a claim for the full amount. He had gone on under the contract, because it required in the event of any dispute he shall proceed with the work and he had elected to do that rather than to stand upon his right to insist upon an immediate understanding.

That claim got lost, apparently, in the files of the Government for some time, and later on—I won't attempt to give the date; it all appears in the documents—the contractor learned that it had been lost and he was requested to file a new claim and a new claim was filed, and that was acted upon in the department and in some fashion not disclosed to the contractor, and information thereon refused to the contractor, the examining officer saw a basis for allowing \$2600-odd of the claim as excess of labor

that had been caused through this procedure. I might say that the claim was supported by written statements at that time of the officers in charge concerning the fact that they had required this work to be done because of the interest of the Government and that it had resulted in some excessive cost. The action rejected the major part of the claim in excess of \$4,000 on the ground—I don't recall, but—held that it wasn't proper under the contract, and the contractor was sent forms to indicate his acceptance of that decision.

A consent was prepared and returned which accepted the \$2600, reserving the right to the other. That was not satisfactory [7] to the officers of the Government, so that no further action was taken on that and no part of it has been paid. Instead, the contractor prepared an appeal, as required by the contract itself, to the proper officers, and supported it with documentary evidence on the claim, and in due course of time that appeal was rejected and we are now here in court.

However, we are in court on the theory not of an amount due under this contract from the Government, but for damages due to the breach of the contract by the Government, the breach consisting in the Government's failure to deliver these plumbing items in accordance with the terms of the contract and so they could be installed in an economical and customary good plumbing manner, and the amount of the damage that we have asked for is the excess cost that it has resulted in to the contractor.

I believe that covers a general statement of it.

The Court: Does the contract require that these plumbing fixtures, I understood you to say, would be delivered en masse?

Mr. Harmon: The contract provides, Your Honor, that the Government should supply them. There is no statement in the contract as to the time of delivery but the whole essence and purpose of the contract is speed. It is a mass contract. It was expected that they would be delivered en masse. The evidence will show that clearly and the contract provided further, explicitly, that the contractor should designate the date of [8] delivery, which the contractor did, calling for the delivery on August the first of that year. And that was a very important item to him, not only to avoid the rainy weather, but to permit the proper installation in an economical, good manner.

The Court: Very well.

Mr. Licking: We are prepared, Your Honor, to concur in the statement of fact. I take it that the contract will be the first item to be introduced in evidence?

Mr. Harmon: Shall I proceed? I have it all outlined here. I thought you might want to make an additional——

Mr. Licking: No. I have a motion to make as soon as the contract is placed in evidence, but I haven't anything to add to your statement.

Mr. Harmon: Well, at this time, then, if Your Honor please, will Mr. Licking produce the contract and the requisition for the——

Mr. Licking: Specifications. So far as the requisition for the plumbing supplies is concerned, that requisition was issued at the request of the contractor and it did provide for delivery on October 1.

Mr. Harmon: August 1.

Mr. Licking: August 1. This is a copy of the contract and this, the specifications, which are made a part of the contract.

The Clerk: As one exhibit, Mr. Harmon? [9]

Mr. Harmon: That will be all right. Perhaps——

The Clerk: We will make the contract 1 and specifications 2.

(Thereupon the documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 1 and 2, respectively.)

Mr. Licking: If the Court please, basing the motion on the statement made by counsel of the fact and upon the documents just introduced, and calling the Court's particular attention to 3 and to 15 of the contract, I object to the introduction of any further evidence in the case. The statement of the facts made by counsel and the provisions of the contract provide in effect that wherever there is a dispute there shall be what counsel outlined, an appeal, and that the decision of the contracting officer shall be final. That is a flat, definite provision of the contract.

The Court: Well, Mr. Licking, taking the theory of the plaintiff's cause of action, that that action

was taken by the officer arbitrarily and capriciously, and may he not go beyond that award if he can prove that it was taken arbitrarily and capriciously?

Mr. Licking: If he is limited to that, Your Honor. I feel he is bound.

The Court: He would be bound by the award unless it had been made by the contracting officer arbitrarily.

Mr. Harmon: If the Court please, that is not entirely the [10] theory of the plaintiff. We have an action here for a breach of contract and that the Government breached its contract and we are suing for breach of contract.

The Court: Is your theory that the Court is not bound by the interpretation placed by the——

Mr. Harmon: By the contracting officer; that is right. And that is the point that we expect to brief for Your Honor.

The Court: I think there is a decision of authority on that.

Mr. Harmon: There may be, but we think our theory is sound and in this case it is thoroughly equitable and just.

The Court: Well, you may proceed.

Mr. Harmon: All right. Now there are a group of letters and a chronological, factual statement that we want to offer and an oral stipulation, if we can work it out. May it be stipulated, Mr. Licking, that this document consisting of nine and a half pages, denominated "Statement of Facts," is a summary of the documents, letters and other docu-

ments that have been interchanged between the parties hereto, and is correct in so far as it does not differ from the actual letters and documents, copies of which will also be introduced, and that this is introduced primarily for the convenience of the Court?

Mr. Licking: Attempted to be a chronological summary of what happened; it refers to certain action and to certain [11] correspondence; in some places it attempts to interpret the correspondence and attempts to describe correspondence with reference to action. That part, of course, the documents themselves would control. Now, the documents which are numbered Exhibits 6-A to 10 I will present at this time. They may be marked; both may be marked as joint exhibits.

Mr. Harmon: That is all right.

Mr. Licking: That is where—I must withdraw that statement, if the Court please. In view of my objection to the introduction of any evidence.

The Court: Well, I will consider the evidence later on as to whether or not it is legally sufficient and——

Mr. Licking: I take it that all evidence now introduced, other than the contract, is being introduced over the objection heretofore noted and with reservation of a move to strike at a later date.

The Court: Very well.

The Clerk: Does it make any difference—that is Plaintiff's 3.

Mr. Harmon: Yes.

(Thereupon the documents referred to were received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Harmon: The next document that I wish to offer in evidence is a copy of the appeal and the supporting letters and data attached thereto. [12]

Mr. Licking: Dated when?

Mr. Harmon: May 18; letter of transmittal of May 18 and the appeal itself of May 17, 1945.

Mr. Licking: That will be Exhibit——?

The Clerk: No. 4.

(Thereupon appeal and supporting data were received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Harmon: The next document is the decision on that appeal dated July 25, 1945.

(Thereupon decision on appeal was received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Harmon: The next document, if the Court please, is the affidavit of E. H. Frick. Mr. Frick is the plumbing sub-contractor and he was here in court at the time this case was first set for trial and by stipulation of counsel, who had been furnished with a copy of the affidavit, we would like to offer this affidavit in evidence as what his testimony would be if he were to be present.

The Court: Very well. No objection. It may be received. That is the affidavit of whom?

Mr. Harmon: E. H. Frick.

(Thereupon affidavit of E. H. Frick was received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Licking: I understand that Mr. Lindsay will be present so he can be examined with reference to any statements made to [13] him by Mr. Frick?

Mr. Harmon: Yes, he is here.

Mr. Licking: This will be Exhibit what?

The Clerk: No. 6.

Mr. Harmon: We will call Mr. Nickel now to the stand, if Your Honor please.

THOMAS R. NICKEL

a witness called on behalf of the plaintiff, having been duly sworn, testified as follows.

The Clerk:

Q. What is your full name?

A. Thomas R. Nickel.

Direct Examination

Mr. Harmon:

Q. Mr. Nickel, what was your occupation in the year 1942 and 1943?

A. I was a field office manager on the Benicia project there for E. H. Frick Plumbing Company.

Q. And they were the plumbing subcontractors on that project? A. Yes.

Q. As such, were you present on the project during the time of the construction? A. I was.

Q. Were you present continually on that project? A. During the working period.

(Testimony of Thomas R. Nickel.)

Q. Did you have charge of the books and records? [14]

A. Yes, I did.

Q. Of the project. And were those books and records as of the entries made by yourself and others under your supervision and control?

A. That is right.

Q. Now, directing your attention to this controversy over the installation of the plumbing fixtures, will you state from your own knowledge, so far as you know, just how those plumbing fixtures were received? I mean by that, as to quantities and dates and so on.

A. Well, I take it you don't want to go too much in detail because it is very lengthy.

Q. Give us some of the detail. It won't take long.

A. Well, we had, some of the stuff came in, just a few of them—for instance, refrigerators came. They didn't have the drip pans with them. And when some of the lavatories and the sinks came they didn't have the trim on them. When the toilets came they didn't have the seats on them. They came at different times and in part shipments, delayed shipments and so forth. And our original plan was—we had our units all drawn up, schedule drawn up to go into a house, then install the space heater, the hot water heater, the refrigerator, the gas range, and the toilet, the sink, the trays, everything, and leave that building. The estimate was

(Testimony of Thomas R. Nickel.)

based on that figure, but we couldn't do a single thing that way. And when we tried to accumulate it, [15] we rented a warehouse and held some of them, trying to hold them so that we could get an accumulation and get the fixtures so we could put them on and install the completed unit. The Government——

Mr. Licking: If the Court please, I object to this as argumentative and not responsive to the question which was with reference to how and when the fixtures were delivered.

The Court: Yes. It is not responsive.

Q. (By Mr. Harmon): You have the question in mind now, Mr. Nickel, how and when they were delivered. Do you know when they were, when delivery started?

A. I will refer you to a letter which you have in the file which you can, if you want to, refer to that.

Q. Do you remember the date of the letter?

Mr. Licking: Is the letter not an exhibit?

Mr. Harmon: It is one of the exhibits.

Q. I will give you this copy of that exhibit, Mr. Nickel, and it might help you to refresh your recollection. Maybe you can find the letter you refer to.

Mr. Licking: Class—Class 5-G, a complete chronological statement made by the plaintiffs here.

A. This letter is date of December 1, 1942.

Q. (By Mr. Harmon): And does that set out

(Testimony of Thomas R. Nickel.)

a correct chronology of the date that items were received up to that time?

A. Yes. I will read it if the Court would like.

Q. Go ahead.

A. Because——

Mr. Licking: If the Court please, that is cluttering the record, reading this.

The Court: No. There is no need. It is in the evidence now.

Q. (By Mr. Harmon): You don't need to refer to it and read it, Mr. Nickel. What we would like is a statement supplementing these exhibits and showing what happened, of your own personal knowledge there. May I ask you this question: You know Mr. Geddes? A. Yes, I do.

Q. Do you know what position he had in connection with the matter?

A. He was in charge of the project for the Government there.

Q. Is Mr. Geddes here in the courtroom?

Mr. Licking: No.

Q. (By Mr. Harmon): And do you know Mr. Towers, Ray Towers? A. Yes.

Q. And what was his position there?

A. I don't know his technical title. He was one of the inspectors or men in charge of the work.

Q. And did he give instructions from time to time to you? A. He and Mr. Geddes.

Q. Geddes, also? [17]

A. Yes; usually together.

(Testimony of Thomas R. Nickel.)

Q. Do you know Mr. Ferguson as of that time?

A. No, I had not met Mr. Ferguson up to that time.

Q. Do you remember the names of any of the other officers of the Government who had to do with you during that time?

A. Mr. Kelly was one of the inspectors but he is dead now.

Q. Now, did you have discussions with any of those Government officers regarding these plumbing fixtures and the way they were arriving and the way they were to be handled?

Mr. Licking: That is hearsay, if the Court please, and I can't see its materiality.

The Court: Overruled.

A. Both vocally and by letters which are in file we called attention to the fact we were being delayed and the costs were mounting constantly.

Q. (By Mr. Harmon): I am speaking now of the oral conversations that you had, particularly.

A. Well, one particular thing I had, I think has a bearing on this, the fact that we were definitely ordered by Mr. Geddes, with Mr. Perris present, that we had to go ahead and install these fixtures as they came in, or we would be pulled off the job, and Mr. Geddes said the Government would put their own men there to do the installing.

Q. Do you remember when that instruction was given you?

A. Well, that was around, that particular in-

(Testimony of Thomas R. Nickel.)

stance was around [18] the 19th of November of 1942.

Q. Was that instruction given to you on more than one occasion?

A. Not in those exact words.

Mr. Licking: If the Court please, it is obvious that this one instruction wasn't given on any more than one occasion and that instruction is set out in the exhibit. I can't—

The Court: He is calling for verbal instruction, though.

Mr. Licking: Well, if the instruction is any different than that set out in the exhibit. Has Your Honor the exhibit in mind?

The Court: Perhaps it is weight and accumulation.

Mr. Licking: That is, Your Honor, the exhibit.

The Court: No.

Mr. Licking: It is Exhibit 5-B.

The Court: Well, does the verbal instruction—

Mr. Harmon: Yes. The verbal instruction I am referring to.

Mr. Licking: November 20, 1942; it is stated in quite detail there, refers to Mr. Geddes there.

The Court: Apparently there is no dispute the instructions were made or given?

Mr. Licking: On that date, none.

Mr. Harmon: That is true.

Q. I now ask if there was a similar instruction given on any other occasion, orally. [19]

(Testimony of Thomas R. Nickel.)

A. Not just in those same words. The indication was we had to proceed and we were given a definite time we had to get those fixtures installed, but that particular instance on that date was given that we had to proceed immediately or the Government would pull us off the job and put on their own men.

Q. Was any reason assigned or stated to you by those gentlemen as to why you had to proceed at that time?

Mr. Licking: To which I will object on the ground it is entirely immaterial; the direction was given. What reasons they had for giving it wouldn't seem to me to have any bearing on this case.

The Court: Sustained.

Q. (By Mr. Harmon): Coming back, Mr. Nickel, to the way these fixtures arrived, to your best recollection, when did the first fixtures come?

Mr. Licking: If the Court please, that is set out in the exhibits in the definite statement it is, set out the chronological dates set out in the exhibit. What is the point of this witness? I haven't—This witness.—We have already this correspondence is in the files. This correspondence is before the Court. I haven't any——

The Court: I don't know what is in the chronological statement but if this evidence is in there, why burden the record with the accumulation?

Mr. Harmon: I don't think it is in there. [20]

Mr. Licking: The record shows the delivery dates.

(Testimony of Thomas R. Nickel.)

Mr. Harmon: I wanted to support that with oral testimony.

Mr. Licking: Well, he will testify undoubtedly that these letters state the correct facts?

The Witness: That is true.

Mr. Licking: That is true.

Mr. Harmon: That saves us, Your Honor, on that score.

Q. Now, Mr. Nickel, with regard to——

Mr. Licking: May I suggest, if you wish this identified specifically, Exhibit 6-A, there is a definite statement of delivery dates of the oil heaters and of the other material mentioned.

Mr. Harmon. That is all right.

Mr. Licking: And I imagine that you have examined that. That is what you had in your hand?

The Witness: This letter here.

Q. (By Mr. Licking): You had prepared that yourself? A. That is right.

Q. And your records indicate it is correct?

A. Yes.

Q. (By Mr. Harmon): Mr. Nickel, directing your attention, then, to another phase of this matter, the record of costs, did you keep a record of the costs incurred by reason of the installation of the plumbing? Now, I am speaking of the whole record of costs, not particularly—Let me withdraw the question [21] and put it this way:

Was it your duty to keep a record of the costs expended on that contract?

(Testimony of Thomas R. Nickel.)

A. Yes. We kept a cost accounting breakdown on the different items. We set that up according to the way the bid was put in.

Q. Now, did you keep a record of the costs directly attributable to the installation of these plumbing units?

A. As nearly as possible. Indirect costs, naturally, we couldn't. That had to be determined from the overall picture.

Q. What do you mean by indirect costs?

A. Well, as far as the unit, and as far as installing the heaters and the gas ranges and things, we kept those items separate from all other operations.

Q. Did you prepare at the request of Mr. Lindsay a statement of the total cost of the installation?

A. Yes.

Q. And was that furnished to Mr. Lindsay?

A. Yes. There is a record of that, I believe, on file.

Q. And directing your attention to Exhibit 5-I of Exhibit 3-B, are the figures shown on that page the figures that were prepared by you at the request of Mr. Lindsay?

Mr. Licking: If the Court please, I would like to have the source from which they were prepared.

Mr. Harmon: This is preliminary, of course.

Mr. Licking: Well.

A. I have another one which I gave him that is probably on [22] file, from which these figures were taken, here.

(Testimony of Thomas R. Nickel.)

Q. (By Mr. Harmon): Well, are those—speaking of the figures directly, are those the ones that you gave him, to your best knowledge and recollection?

A. They seem to be. I can check it with my original and tell you.

Q. Will you do that? Have you got your original here?

A. It is in the file here. This is my copy from which his copy was prepared.

Q. Now you are referring to Exhibit 6-A of Exhibit 3-B and those figures are the ones submitted by you to Mr. Lindsay, is that right?

A. That is right.

Q. And where did you get those figures, Mr. Nickel?

A. They were taken from our cost accounting records.

Q. Are they true and correct?

A. As much as it is possible to be, barring any error, and we have not been able to find any.

Q. I will ask you if those figures reflect the full amount of the cost of installing those by reason of the delays and piecemeal installation.

Mr. Licking: To which we object. It calls for opinion and conclusion of the witness.

The Court: Overruled.

A. That is our total. [23]

Mr. Harmon: Read the question again.

(Question read.)

(Testimony of Thomas R. Nickel.)

A. Those figures were taken from our cost accounting records and those reflect the actual cost of these operations which are being considered. They don't contain, however, a number of other incidental charges, indirect charges such as storage on warehouse, telephone and rental of trucks, rental of our equipment, and various items of that sort which have their own bearing and are not included in this.

Q. (By Mr. Harmon): Then, in other words, you are referring to what could be termed as indirect costs?

A. Yes, and they are not contained in here.

Q. And by that do you confine your remark to indirect costs which were directly attributable to this method of delivery and installation?

A. There are, naturally, a number of those things which you just can't—the general overhead.

Q. Have you got any actual figures? Do your records show any actual figures for those added costs?

A. We have them all; our entire costs are all carried down on the different——

Q. What I mean, Mr. Nickel, is this: Do you have any breakdown in actual figures showing——

Mr. Licking: If the Court please, I wish to object to this line of testimony, if I have in mind what counsel is apparently [24] trying to do. The petition before the Court, as counsel stated and as I understood the Court to have stated, is a ques-

(Testimony of Thomas R. Nickel.)

tion presented as to whether or not the action of the reviewing officer in refusing the claim as submitted was or was not an arbitrary and capricious action.

The Court: There is an additional question involved as to whether the officer could pass upon the interpretation of the contract.

Mr. Licking: That is true, Your Honor, but the apparent effort to raise the claim as submitted certainly is not properly before the Court. That is all that is being done here. The witness is being questioned not about the items which appeared but in effect he is being asked if there weren't other items.

The Court: Is that true?

Mr. Harmon: No, Your Honor. What I am trying to get at is this: The testimony would show that this is a very conservative figure in the claim that was submitted.

The Court: Well, you will be confined to your proof as to what goes into the claim that you have submitted.

Mr. Harmon: In the claim that was submitted there was an item for overhead amounting to around 15 per cent. The figures show that the actual direct costs were \$5900, and then in submitting the claim the contractor added an item for overhead and profit which ran the claim up to \$6800. Now, that is the claim [25] as submitted and as it was turned down. We are suing for that

(Testimony of Thomas R. Nickel.)

amount and we are bound by that amount but I am trying to elicit testimony from this witness to show that the difference between the \$5900 and the \$6800, whatever those figures are, is actually additional damage due to increased overhead.

Mr. Licking: Why don't you ask him that question instead of asking something else?

Mr. Harmon: All right. We will ask that question directly. It happens that that figure is not shown in that particular document. It would be in the claim, however.

Q. Mr. Nickel, referring to Exhibit No. 8-A, page 3.

Mr. Licking: Exhibit what?

Q. (By Mr. Harmon): 8-A, page 3 of Exhibit 3-B, I call your attention to the first figure which represents \$5942.67 and which you testified you furnished to Mr. Lindsay.

A. Yes. That is correct.

Q. That is the cost of the plumbing, is it not?

A. Yes.

Q. Now, you notice another item, contractor's profit and overhead, \$891.34. That represents a claim of Mr. Lindsay and Mr. Wilson, the plaintiffs herein, does it not, in addition to——

A. Yes, that is in addition to this.

Q. Now directing your attention to that particular item, Mr. Nickel, do you have an opinion as to the amount of indirect expense that was paid by the contractor and which was directly [26]

(Testimony of Thomas R. Nickel.)

traceable to the fact that the fixtures were delivered piecemeal and required to be installed?

Mr. Licking: If he has such an opinion. The claim has been filed here. It is irrelevant and immaterial.

The Court: Is there a breakdown of that?

The Witness: This was Mr. Lindsay's addition for indirect overhead. I had nothing to do with that. He was asking for my opinion.

Q. (By Mr. Harmon): That is right.

Mr. Licking: I don't think his opinion, if the Court please, is relevant.

Mr. Harmon: I can qualify him on that, Your Honor, if he isn't qualified already.

Q. You kept the cost records?

Mr. Licking: I assume the witness is qualified but it seems to me it is just cluttering up the record. I don't see—that is in.

The Court: Overruled. You may answer.

A. I believe I recall correctly when Mr. Lindsay made that estimate.

The Court: You were asked if you had an opinion.

Q. (By Mr. Harmon): Answer that directly, yes or no.

A. I think that is a very low claim as far as that amount is concerned, as to indirect.

Q. Now, let me ask this question, yes or no, do you have an [27] opinion?

A. Yes.

(Testimony of Thomas R. Nickel.)

Q. All right. Now, what is that opinion. In your opinion, what is the amount of overhead that would be due directly traceable and due to the fact that these items were delivered piecemeal and required to be installed piecemeal?

A. In my opinion, I feel that even \$2,000 would not be excessive.

Mr. Licking: That—may that be stricken, if the Court please?

The Court: Well, I think that is a statement that the amount that is there is proper. Denied.

Q. (By Mr. Harmon): Now, will you tell the Court just how that additional overhead, why it was necessary?

A. Well, other than the——

Mr. Licking: May I ask, that question, why it was necessary, doesn't seem to be relevant.

Mr. Harmon: Well, of course,——

Mr. Licking: What is it you want to elicit from the witness?

Mr. Harmon: I want to show that there was this increased overhead. I want to show that it was reasonably related.

The Court: Why do you say that this increased overhead was attributable to this situation?

Mr. Harmon: That is right. [28]

A. In one particular instance where we were ordered to get our men back on the job when it was raining, and install these—these toilet seats

(Testimony of Thomas R. Nickel.)

came in, when other equipment hadn't come yet so we couldn't complete the building, it meant that we had to have our men go out and carry them; the trucks couldn't get out on the ground, and I told Mr. Geddes they had got bogged down. We had to lay the men off.

Mr. Licking: Now, if the Court please, there is enough of that answer that I can move it be stricken. He was asked if an indirect charge was proper and he is answering about a direct charge.

Mr. Harmon: That is right.

The Court: Yes.

Q. (By Mr. Harmon): Is the indirect——

Mr. Licking: I ask that the answer go out.

Q. (By Mr. Harmon): Were you required to maintain a warehouse and two men?

Mr. Licking: Objected to as irrelevant, and I object to it on the ground it is leading and the witness' statement about what expenditures were required is not subject to cross examination except from his books.

The Court: Overruled.

Mr. Harmon: Go ahead.

A. This is a question regarding the indirect?

Q. (By Mr. Harmon): That is right. [29]

A. Yes. The very nature of those are varied and somewhat intangible but we had rental on warehouses which we had to keep because, according to the specifications of the document, we were supposed to unload and to take the material

(Testimony of Thomas R. Nickel.)

and install it, and coming in different parts that way we had to have a warehouse ready at all times so we could unload the car and put it right in there and then transport it up to the plant. We had to keep our rental on that. We had to keep our truck rental paid and different equipment rentals, and so forth. If these had come so we could have got them installed and got them out of the way, all that additional expense would not have been necessary. There were telephone bills, light bills, and night watchmen and all those various things which are indirect, and they are fairly intangible because you can't definitely say that it cost so much. But I have an opinion, handling the books and paying out the money and so forth, and making the recordation, and so forth, I have an opinion. I know that it added up considerably to a cost other than it would have if they had all come at the proper time and been installed according to schedule.

Mr. Harmon: You may cross examine.

Cross-Examination

By Mr. Licking:

Q. Did the contract require that a warehouse be maintained, warehousing be maintained by the contractor, or do you know? [30]

A. Are you asking me? Are you asking me?

Q. I am asking you.

A. So far as I know about the contract, we were to do whatever was necessary to get the——

(Testimony of Thomas R. Nickel.)

Q. I asked you a specific question: Didn't the contract require that? You speak about the expense of warehousing these fixtures which arrived at different times. Let me finish my question.

A. Surely.

Q. And you say that the warehousing is one of the items that went into this indirect expense?

A. That is right.

Q. How did you carry the warehouse on your books?

A. We have entries, entries down for warehousing.

Q. Entries down for warehousing. What other materials did you warehouse besides these?

A. That was all in this warehouse.

Q. Pardon?

A. This warehouse was carried specifically for the Government equipment down near the depot.

Q. Again, now let's be a little more specific about that, was it carried specifically for this equipment?

A. That is right.

Q. These items? Or was it not carried for equipment in general, and didn't your contract require that you maintain it? [31]

A. We had a warehouse on the project for our own material which we supplied.

Q. Yes, and you also——

A. This was a building rented specifically down by the railroad station.

(Testimony of Thomas R. Nickel.)

Q. Was it rented alone for this particular material or wasn't it rented for all of the Government material delivered on the job? All of it?

A. These fixtures; we rented for the Frick Plumbing Company. It had nothing to do with the other subcontractors or general contractors. We rented for these delayed shipments of the Government.

Q. You mean you rented it for the shipments that hadn't come?

A. Yes, so we would have it ready, and parts we were holding and waiting for the others to come.

Q. That was a direct charge?

A. It is a direct, but the additional length of time that we had to hold up the project waiting for them to arrive is over extra charge.

Q. I see. Have you your books on that so I can look at that?

A. The entire books have been submitted.

Q. Have you your book entry on that particular thing? I would like to run over it with you.

A. The books are here.

Q. All right. Can we have them? [32]

(Books were produced.)

Mr. Licking: If you will come down, if you don't mind. You are more familiar with these than I am.

Q. Pick out the ledger entry there, your book

(Testimony of Thomas R. Nickel.)

entry that covers this warehousing which you say was specially for this particular equipment.

The Court: We will take a short recess.

(Recess.)

Q. (By Mr. Licking): Let's see. You were referring to—were discussing Exhibit 6, the letter of the 26th, and we were particularly referring to the item of \$891.34 that is contractor's profit and overhead. Do you have that?

A. Yes, I have.

Q. You have that particular exhibit in mind in front of you, and what we were discussing, you had been asked some general questions with reference to this amount of \$891.34. Now, the amount of \$5,942.27 set up there, that is the amount that the subcontractor, Frick, billed or invoiced the plaintiff here, the main contractor for?

A. That is correct.

Q. That is what you had to pay Frick on account of such estimate of his extra expense on account of this delay, and the figure of \$891.34 doesn't reflect any specific allocation of any part of the various expenses shown in your ledger sheet; it is just an arbitrary 15 per cent taken on this amount of [33] \$5,943?

A. 15 per cent of that total cost, yes.

Q. 15 per cent that the main contractor, the plaintiff here, Mr. Lindsay—

A. Yes.

Q. —and you figured that Mr. Lindsay ought to make on the subcontractor's work? Right?

(Testimony of Thomas R. Nickel.)

A. I didn't get that question.

Q. Well, that is what Mr. Lindsay and you figured that Mr. Lindsay should make on the sub-contractor's work?

Mr. Harmon: Should make on that work?

A. No. That was to cover some of the indirect costs, in other words.

Q. (By Mr. Licking): You never made any allocation of any of those indirect items? You never went over your ledger and took out so much for warehouse expense and so much for telephone and so much for equipment, and put it into that \$891?

A. If we had, I am afraid it would run nearer \$2,000.

The Court: You didn't, though?

A. No.

Q. (By Mr. Licking): Never mind "if you had." You were the bookkeeper for Mr. Frick?

A. That is right.

Q. Not for Mr. Lindsay?

A. No. [34]

Q. And in preparing this claim for Mr. Frick you did go over your ledger sheets and you did pick out the definite items which went into the sum of \$5,942?

A. That is right.

Q. And 27 cents.

A. That is correct.

Q. And those definite items are supported by the ledger sheets which you have?

(Testimony of Thomas R. Nickel.)

A. Yes.

Q. And by certain time cards?

A. Yes.

Q. Which are here. Now, I don't want to take any more of your time than I have to. It is a fact, is it not, that so far as any allocation of the work to the installation of these specific pieces of equipment, that allocation appears, where it does appear, on your time cards?

A. Yes, we have the different——

Q. Just answer my question, not guess what you have. That allocation, wherever it appears, appears on your time cards?

A. That is right. That is where we got it from; and from the ledger sheets.

Q. As a matter of fact, your ledger sheets, itself, as you carried the ledger on the job, the ledger showed no such allocation?

A. The ledger sheet is right here. That is where we got our [35] costs.

Q. I know that is where you got your costs. Did you understand my question?

A. No, I didn't.

Mr. Licking: Read the question.

(Question read.)

A. I would say that is an incorrect statement. I couldn't——

Q. (By Mr. Licking): All right. You have the ledger with you. Will you show me where the ledger showed allocation to installation costs?

(Testimony of Thomas R. Nickel.)

A. Well, we can take——

Q. Well,——

A. —it cost us \$900——

Q. Where is it?

A. \$85.37 to install the oil heater.

Q. Wait a moment. May I see the ledger, see the sheet?

A. Certainly. Do you want me to answer your question?

Q. No. I want you to show the ledger sheet to which you are referring.

A. All right.

Q. Was there any allocation at the time you carried the job on to extra cost on account of delay, or was it just carried on “general”?

A. We had no idea as to what the excess cost would be. Therefore we couldn’t carry it. [36]

Q. Then there was no allocation in your books as to the installation of these particular items, and there is no allocation except such as appears on your time cards. That is correct, isn’t it?

A. There are time cards and our ledger sheets are our total records. There were no other.

Q. Do you understand what I mean by allocation?

A. Yes, I know; that is a definite answer.

Q. All right. That is a definite word. I will ask the question again. Other than the allocation, the specific allocation shown by your time cards, your records do not reflect a specific allocation to cost of installation of the fixtures?

(Testimony of Thomas R. Nickel.)

A. Or cost——

Q. Of over cost?

A. That would be taking our total cost.

Q. You can answer that. Is that or is it not a fact, and then tell me why afterward. That is a fact, is it not?

A. The fact is, I—the cost on here——

Q. Would you answer my question yes or no, Mr. Nickel? I asked you if it isn't a fact your ledger and your books as kept on the job show no such allocation. Is that or is that not a fact?

A. That is not a fact.

Q. Tell me, then, where it shows such an allocation to this overrun because of the failure to— Show me where it shows that allocation. [37]

A. We have our total of oil heaters and all the different equipment set out, every one that the Government furnished. It shows them all separate. Naturally we couldn't total those up. We couldn't carry that along.

Q. I didn't ask what you, naturally, did. I asked you what you did and if so, where. Where is that allocation, if it was ever made?

A. We carried a weekly one each week but we couldn't total it until the job was completed.

Mr. Harmon: I will object to the interrupting of the question.

The Court: I can't hear three people at the same time.

Mr. Harmon: I object to his interrupting the

(Testimony of Thomas R. Nickel.)

witness. He should let the witness answer the question.

The Court: I don't think the witness has answered the question.

Mr. Licking: That is it.

The Court: Objection is overruled. Proceed.

Q. (By Mr. Licking): You understand my question with reference to an allocation?

A. No, I don't. I am trying to answer your question but evidently we are not getting together.

Q. No, we are not getting together because, frankly, I don't think you are answering the question I asked you. It may be because you don't understand it. I will ask it again. In [38] order to present this claim against the United States here, you made an allocation of items from your ledger?

A. That is right.

Q. To this claim; added installation costs. You understand that?

A. That is right.

Q. You made that allocation?

A. That is right.

Q. Now, prior to that time was there any such allocation made in your ledger prior to the time you made up this claim?

A. The allocation from which all those figures were obtained was made each week in here.

Q. Is there any weekly allocation in there to this added expense?

A. I will have to repeat again that those were obtained from these figures.

(Testimony of Thomas R. Nickel.)

The Court: Was that the overall cost without an allocation?

A. That is right, yes, that is right. Yes, that is right.

Q. (By Mr. Licking): The allocation was not made so far as our ledger was concerned until you withdrew or identified certain items there with this claim?

A. You are correct.

Q. Right. Then, at the time you carried this job on you made no such allocation except that which is shown on your time [39] cards?

A. And here.

Q. Well, again, I thought you just said there was no such allocation here at the time you carried on the job.

A. You said for the extras and I said you are right.

Q. Well, well. Then there was no such allocation made in your books until you got ready to make up this claim?

A. The allocation of the cost was made at the time. This other was drawn up subsequent.

Q. What other was drawn up subsequent?

A. Your claim.

Q. Your claim was drawn up subsequent?

A. That is right.

Q. What did you make up the claim from?

A. From these records.

Q. From these records which are here?

(Testimony of Thomas R. Nickel.)

A. Which were made at the time.

Q. And do those records there show any allocation except as of the date you made up that claim? In other words, you just took out, you made this claim up from your ledger?

A. You are correct.

Q. And your ledger, prior to that time, showed no such allocation specifically to this extra cost?

A. Not to extra cost.

Q. All right. And it is extra cost from which the claim is [40] made?

A. They were made from these records.

Q. They were made from the records, but the records themselves show no such allocation. Where did you get the allocation? How do you know which of these records here which you pulled out are attributable to extra time and material necessitated by failure to deliver material?

A. I think you are asking me irrelevant questions, if you would check this claim.

Mr. Licking: If the Court please, I should like to have this witness requested not to argue.

The Court: Yes. Don't argue with counsel. Won't you answer?

Q. (By Mr. Harmon): Do you understand the question? Do you want it read, the question repeated?

The Witness: I think I have answered it.

Mr. Licking: May the question be read, please?

(Question read.)

(Testimony of Thomas R. Nickel.)

A. If you will permit me the time, I will answer that question.

Mr. Licking: Yes. I will be seated. You can have all the time you want to answer.

A. I appreciate that very much. Now, you asked the question as to how we arrived at those figures.

Q. I did not ask the question as to how you arrived at the figures. I asked no such question. I asked you if your ledger [41] showed any such allocation during the time you were carrying the job on.

Mr. Harmon: If the Court please——

Mr. Licking: And you said, “No, it did not.”

Mr. Harmon: I think the witness should be allowed to give his explanation.

Mr. Licking: I want to get an answer, of course, and then we will get the explanation.

The Court: Repeat the question to him.

(Question read.)

Q. (By Mr. Licking): Do you understand the question?

A. Yes. These figures that we have here showed our actual costs. We submitted those to the general contractor and we submitted a bill for the difference between these parts——

Mr. Licking: If Your Honor please, this is entirely nonresponsive.

A. ——the difference between what our costs were and the anticipated cost.

(Testimony of Thomas R. Nickel.)

Mr. Licking: This is not responsive.

A. The difference between represents the amount of the bill.

Mr. Licking: Well.

Mr. Harmon: Now, if the Court pleases,—

Mr. Licking: I would like to have my question answered, if the Court please, and that so-called answer stricken as not responsive. [42]

The Court: I think it is in response. Motion denied.

Mr. Licking: All right.

Q. Where did you get the allocation? What original entry shows the allocation?

A. The allocation we took from our different items, like oil heaters and space heaters and various items that were—

Q. Now, you say—Pardon me. You say the allocation you took. That wasn't the question I asked you and you know that. You made the allocation at the time you submitted this claim?

A. Yes.

Q. Your ledger doesn't show that allocation. Where did you get it?

Mr. Harmon: Are you asking a question or making a statement?

Mr. Licking: No. I am stating what he has already answered over the course of about three-quarters of an hour, that the ledger doesn't show the allocation up to the time he made his allocation when the claim was presented, and I ask where

(Testimony of Thomas R. Nickel.)

he got the basis for the allocation, other than the time cards.

Mr. Harmon: Let him answer.

Mr. Licking: All right.

A. Each week, as we made our payroll entries and so forth, we made our entries and our costs on our ledgers here. Every week our payroll went on and our other overhead, they were all [43] broken down here. At the time that this claim was made, we took the items that were charged up directly to installing the oil heaters and the gas ranges and other things that the Government furnished, and that is where our figures were obtained. Now, as to the extra for the \$5,900 and some odd dollars, that represents a difference between our actual cost and the cost that we estimated should have been a normal installing cost had they arrived all in one time or if we hadn't been forced to go out and install them piecemeal.

Q. (By Mr. Licking): Well, O.K. Where again, is your original entry allocating costs to the specific installation of these items?

A. It is right here.

Q. Is that your original entry or is your original entry your time card?

A. This is our original entry here.

Q. Where did you get the data that is in there?

A. We got them out of our payroll, our checks and accounts payable and pay cards.

Q. As a matter of fact, isn't the only original

(Testimony of Thomas R. Nickel.)

entry that you have furnished to me or that you have in the court here now with reference to those allocations, your time cards?

A. The time cards and our payroll records which we made.

Q. Your payroll reports are taken from time cards, are they not? [44]

A. That is right.

Q. All right. But your time cards are the original? A. Yes, that is the original.

Q. The original allocation?

A. That is right.

Mr. Licking: Well, that is all.

Redirect Examination

Q. (By Mr. Harmon): Mr. Nickel, it is true, is it not, that these time cards and ledger cards and payroll records have been furnished to the Government and you have yourself given a lot of time to going over these with the Government and——

A. That is right.

Mr. Licking: That is a fact, and I thank him very much.

Mr. Harmon: That is all.

Mr. Licking: I would like to have those ledger sheets marked for identification, and the time cards also.

Mr. Harmon: Yes. I should like to offer the ledger sheets and time cards in evidence, if Your Honor please.

The Court: Any objections?

Mr. Licking: Oh, none, if the Court please.

The Court: They may be received.

Mr. Licking: Other than the general objection.

(Thereupon the ledger sheets and time cards were received in evidence and marked Plaintiff's Exhibit No. 7.)

The Court: We will recess until 1:30.

(Thereupon an adjournment was taken until 1:30 P.M.) [45]

Afternoon Session

Friday, October 17, 1947, 1:30 o'Clock

RAY T. LINDSAY

was called as a witness on behalf of the plaintiff, and having been duly sworn, testified as follows:

Q. (By The Clerk): What is your full name?

A. Ray T. Lindsay.

Direct Examination

Q. (By Mr. Harmon): Mr. Lindsay, you are the brother of Claude T. Lindsay who is one of the plaintiffs in this action are you not?

A. Yes, sir.

Q. And what position did you hold with reference to your brother and Mr. Wilson, his partner, in this contract which is the subject matter that we are discussing here?

(Testimony of Ray T. Lindsay.)

A. I was their manager on the project.

Q. You were the manager on the project up at Benicia? A. That is right.

Q. Did you have personal charge of the project for them there? A. Yes, sir.

Q. That was back in 1942, wasn't it?

A. That is right.

Q. Will you tell the Court what your experience was at that time with reference to building contracts of a general nature?

Mr. Licking: He is qualified. [46]

Mr. Harmon: You will stipulate so?

Mr. Licking: Yes.

Mr. Harmon: All right.

Q. Now, directing your attention to the particular matter in controversy, do you recall making the requisition for the delivery of the plumbing items that were to be furnished by the Government?

A. Yes.

Q. And that they were required by you to be delivered August 1, 1942? A. Yes.

Mr. Licking: Required or requested?

Mr. Harmon: Whatever the language of the requisition is is what I meant.

Mr. Licking: Requested rather than required.

Q. (By Mr. Harmon): Were those items delivered at that time as requested?

A. No, they were not.

Q. Will you state briefly to the Court how they were delivered?

(Testimony of Ray T. Lindsay.)

Mr. Licking: Now, if the Court please, that——

Mr. Harmon: Withdraw the question.

Mr. Licking: You have—it would be just—you have the exhibit.

Mr. Harmon: It would be cumulative.

The Court: Yes. [47]

Q. (By Mr. Harmon): You recall how they were installed, do you not, Mr. Lindsay?

A. Yes.

Q. And without rehashing the story of what that was this morning, it was piecemeal, at the request and order of the representatives of the Government?

A. Yes.

Q. Did you personally have any discussions with Government representatives in regard to that matter?

A. Yes, on several occasions.

Q. On several occasions. With whom did you talk?

Mr. Licking: Time, place and parties present, if the Court please; foundation of the statements of the conversation.

Q. (By Mr. Harmon): Did you have that——

The Court: One question at a time.

Q. With whom did you talk?

A. I talked with Mr. Powers and Mr. Geddes.

Q. (By Mr. Harmon): Where were these conversations had?

A. In the offices of the—in their offices on the project. And on the site, I would say.

Q. And do you recall approximately when the first of the conversations was?

(Testimony of Ray T. Lindsay.)

A. Yes. Early in October or the middle of September, some place.

Q. Will you state what the substance of that conversation was [48] as near as you can recall it?

Mr. Licking: With whom?

Mr. Harmon: Mr. Geddes and Mr. Towers.

A. Towers, yes.

Q. (By Mr. Harmon): Were they together?

A. Yes, We had received the lavatories and had only received the trim for 42 sets out of 200. We had installed the trim on these lavatories and had them lined up outside of our shed waiting for the balance of the trim to be received so we could continue making the installations, and one morning I was called in to their office and they said that Colonel So-and-so of the Benicia Arsenal had been over and he was unhappy to see plumbing on the site there that hadn't been installed. And I told him that we preferred to wait until we had received all of the trim or all of the plumbing fixtures for a unit, so to speak, before we made installations, and he said, "Well, they wanted those buildings available, wanted the plumbing kept up right up to date so that those buildings would be available at the very shortest moment after the last item had been received." And I explained to them that that certainly was not an orderly way to do it, and a very expensive one as far as we were concerned, and told them that we would certainly have to be compensated for doing it in that way, and they told me that

(Testimony of Ray T. Lindsay.)

at the time, proper time, they would give me their personal assurance that we would be compensated for expenses [49] that we would have, but the main objective was to keep that project right up to the minute.

We went ahead and installed those immediately on their word, the 42, and then at different times during, as different items were received, we were requested by them to install these items immediately upon receipt, although we protested verbally and by letter regarding that method of making installation.

Q. All right. Now, had those items been delivered as requested by you, in what way would you have installed them?

A. We would have waited until we had all the items for one unit. Then we would have delivered it, had it delivered to the unit, and then a plumber would have gone in and completed the unit and he would have been finished.

Q. I see. Do you recall whether or not anything was said to you by Mr. Geddes or Mr. Towers as to what would happen if you didn't follow their instructions to install their units?

A. Yes. They told us that——

Mr. Licking: May I have this more definite? When was that?

Q. (By Mr. Harmon): Do you recall the time that they told you, talked about that particular thing, Mr. Lindsay?

A. Yes. On about the 19th or 20th of November,

(Testimony of Ray T. Lindsay.)

Mr.—it was Friday or Saturday, as I recall; probably Friday—I was called in to San Francisco. It had been raining for several days. I had returned to San Francisco and the plumbers had been released [50] because there was nothing more for them to do, and I was called by Mr. Frick on the phone. He told me Mr. Geddes had required them to—or that some toilet seats had been received and he requested that Mr. Frick call his plumbers back and have those toilet seats installed immediately. I called Mr. Geddes on the phone and told him that that was a very expensive way to operate and I couldn't see how that anything was to be accomplished after the toilet seats had been installed because there were so many other items in the houses that rendered them unfit for occupancy and he then reassured me that they had been told and instructed to see that the job, that these plumbing fixtures were installed as they were received, and for us to do it and that they would take care of the additional cost at a later time.

So I called Mr. Frick, or Mr. Nickel, and told him to go ahead and do it. He called the plumbers back from Oakland. They worked over Saturday, Sunday, holidays and worked early and late and got those items installed. And, of course, that was all at terrific expense to us and very unreasonable, as far as we were concerned.

Q. Now, Mr. Lindsay, during that conversation—

(Testimony of Ray T. Lindsay.)

Mr. Licking: I suppose this is interrogation of argument and one thing and the other, of very little influence on the Court; certainly improper; should be stricken.

The Court: Proceed. [51]

Q. (By Mr. Harmon): Mr. Lindsay, during that conversation was anything said to you what would happen if you didn't go ahead and install that trim and so forth as it was received?

Mr. Licking: He is testifying, counsel, as I understand it; his testimony is to the conversation that somebody had with Mr. Frick and what Frick told him about what somebody told Frick.

Mr. Harmon: I think the question is proper, your Honor. My question, previous to the last answer, was directed to that specific item and then the witness gave his answer, but he didn't cover that particular point and I am trying, directing his attention to that particular point.

Mr. Licking: Well, I will withdraw the objection.

The Court: Was anything said in that regard?

A. Yes. At that time, I think after I returned to the project, immediately following that, we were told, or I questioned, I think, Mr. Geddes regarding his conversation with Mr. Frick that they would bring their plumbers in and charge us for it, and he indicated that that was what they had decided anyway.

Q. (By Mr. Harmon): Now, Mr. Lindsay, what

(Testimony of Ray T. Lindsay.)

is the customary good plumbing practice with regard to installations of that nature and the large projects?

Mr. Licking: If the Court please, I will object to what the proper custom is. The contract——

The Court: Overruled. [52]

Mr. Licking: Exception.

A. Well, to make the installations of all the plumbing fixtures at one time.

Q. (By Mr. Harmon): And is that for reasons of economy as well as other reasons?

A. Yes.

Q. Will you state whether or not the piecemeal installation had any effect on making the unit available more rapidly for occupancy?

A. Yes, very much so.

Q. Now, Mr. Lindsay, directing your attention to Exhibit 10-C of 3-B, page 3, which is a copy of a bill received—a copy of a bill from the E. H. Frick Plumbing Company, will you tell the Court what that is?

A. This is a bill which they rendered to us setting forth the additional charges which they required of us by reason of the installing of the plumbing fixtures at the convenience of the Government rather than as they had contemplated.

Q. Now, does the figure—what was the figure? \$13,047.27—represent?

A. That represents the total labor cost for installing, for handling and installing the mass pur-

(Testimony of Ray T. Lindsay.)

chase of items which were furnished by the Government.

Q. Was that amount paid by you to the E. H. Frick Plumbing Company? [53]

A. Yes, it was.

Q. Now, directing your attention to the next items, handling and installations, costs as originally estimated, \$7,000—200 units at \$35 each, and on the community building, \$105; total, \$7,105. Will you explain to the Court what that figure represents?

A. That represents his estimate for handling and installing these items had they been—or had he been able and been permitted to install them in an orderly and practical way; had he been permitted.

Q. Now, Mr. Lindsay, coming to your own opinion and judgment based upon your experience as a contractor, have you an opinion as to what the reasonable cost of installing those items would have been had they been delivered and you been permitted to install them as a unit at one time?

A. Yes.

Q. Will you tell the Court what that opinion is?

A. It is that this item of \$35 would have been ample.

Q. And was that \$35 per unit?

A. Per unit, yes.

Q. I take it, then, your opinion is that the total of that item, \$7,105, is a reasonable amount that such cost would not have exceeded?

A. Yes, it is.

(Testimony of Ray T. Lindsay.)

Q. Now, tell the Court what the other figure there is, the [54] difference between the \$13,000 and the \$7100-odd dollars.

A. The difference represents the additional charge which Frick incurred by reason of making installations as he did over what he had estimated and could have done it for under normal conditions.

Q. That is the amount you are claiming as damage for having paid out to E. H. Frick Plumbing Company?

A. That is right.

Q. Now, directing your attention to another exhibit, if I can find it, which is Exhibit 8-A on page 3 of 3-B, purporting to be an invoice from Claude T. Lindsay and Martel Wilson to the United States, it carries over the amount of damage which you had paid to the Frick Plumbing Company, is that correct, \$5942.29?

Mr. Licking: You mean the amount of the alleged——

Mr. Harmon: Yes. Amount alleged.

A. Yes, it does.

Q. (By Mr. Harmon): Now, will you explain to the Court this other item, \$891.34, which is labeled "Contractor's Profit and Overhead"?

A. Yes. That represents the contractor's profit——

Mr. Licking: If the Court please, it seems to be self-explanatory.

The Court: I would think so.

Q. (By Mr. Harmon): Let me ask you this

(Testimony of Ray T. Lindsay.)

question: I think [55] that is probably right. Have you suffered any damage in addition to the amount that was paid by you to the E. H. Plumbing Company?

Mr. Licking: If the Court please, whether or not any such damage was suffered is not the subject of this action.

The Court: I wouldn't think so, either. It is the amount of the claim.

Mr. Harmon: Yes. This is in the claim and I am—I want to cover that.

The Court: You want to find out from him how he arrived at that figure?

Mr. Harmon: Yes.

The Court: All right. Ask him.

Q. (By Mr. Harmon): All right. How did you arrive at that figure?

Mr. Licking: If the Court please, how the figure was arrived at—it is stated, it is read—read it again, counsel, what it says.

Mr. Harmon: Overhead.

The Court: That doesn't explain how it was arrived at. Go ahead and answer the question.

Q. How did you arrive at that figure?

A. This represents 15 per cent which the contractor was entitled to receive on all extra work which he was required to perform in connection with the government contract. [56]

Mr. Licking: That is, entitled to receive under the terms of the contract?

(Testimony of Ray T. Lindsay.)

The Witness: Under the terms of the contract.

Mr. Licking: Well, if the Court please, then I move the answer be stricken as inapplicable to the position announced here, that is, damage, if they were claiming the contract, which they say they were not.

That is an item which, according to the statement of the witness, was submitted for something alleged to be due under the contract. Now counsel has announced to the Court that what he was claiming here was damages for breach of the contract, not the amount due.

The Court: It will stand in the evidence as an explanation of the figure and how he arrived at it. Motion denied.

Q. (By Mr. Harmon): Now, Mr. Lindsay, will you state whether or not in your opinion there was any additional overhead, any overhead paid out by you—by you, I mean the plaintiff in this action—which was not included in the amount paid by you to the E. H. Frick Plumbing Company?

Mr. Licking: To which I object on the ground it is immaterial.

The Court: Something beyond the claim?

Mr. Harmon: No, no. I merely want to segregate, if your Honor please, in this claim as it was filed and the plaintiff was then proceeding on the theory of trying to get adjustment [57] under the contract. He has got an item——

Mr. Licking: That is stipulated, counsel, that

(Testimony of Ray T. Lindsay.)

the claim was provided not for damages but for an adjustment under the contract?

Mr. Harmon: Yes. He has got an item of overhead and profit, 15 per cent of the amount of the claim. Now I merely want to elicit from the witness a breakdown between overhead and profit, because under our theory of damages I concede we are not entitled to any profit but we would be entitled to any overhead costs.

Mr. Licking: Well, his statement is that he based that on the contract and the contract allowed 10 per cent profit.

Mr. Harmon: I am going further than that. I have explained the exhibit. Now I seek to bring out from the witness, if there was any expense from it, what.

Mr. Licking: I will reserve the objection.

The Court: I will permit you to do so. Proceed.

Q. (By Mr. Harmon): Do you have the question in mind?

A. I believe so. May I have the question read?
(Question read.)

A. Do you mean any additional overhead or charges or costs?

Mr. Licking: If the Court please, it seems to me——

Q. (By Mr. Harmon): Costs.

Mr. Licking: —the condition, that should refer to the claim; any amount of overhead paid other than that claim. [58]

(Testimony of Ray T. Lindsay.)

The Court: It is included in the claim?

Mr. Harmon: That is true.

Mr. Licking: Well, then, I have no objection to the direct question, what is in that claim.

Q. (By Mr. Harmon): Let me put it this way, Mr. Lindsay: Aside and apart from the damage of \$5900-odd which you claim by reason of payment to Frick Plumbing Company, was there any other damage attributable, in your opinion, to the way the Government delivered and required these items to be installed?

Mr. Licking: That call, of course——

The Court: Why don't you ask him what that item is, the \$800 that you mentioned?

Mr. Harmon: I have already got that in evidence.

The Court: Eliminating the profit.

Q. (By Mr. Harmon): Eliminating the profit, how much would the balance be on that?

A. I would say the overhead would probably run us around 10 per cent on that job.

Q. Now, referring——

Mr. Licking: I would like to have the answer stricken, if the Court please, as non-responsive. The question wasn't what the overhead on the job ran but what that item represented. That question hasn't been answered.

The Court: What do you mean? That is the overhead on the excess cost? [59]

A. That is right.

(Testimony of Ray T. Lindsay.)

Q. (By Mr. Harmon): 10 per cent of \$5900-odd?

A. That is right.

Q. Is that based on your general experience, on contracting business, as to what overhead——

A. Well, on this particular job.

Q. And on this particular job?

A. Yes. That would be very nominal.

Q. Reverting once more to your testimony as to the amount that would have reasonably covered the installation, \$35 per unit, would that cover both hauling and distribution of the materials to the units, as well as installation of those units?

A. Yes, it should be ample for both.

Q. Have you ever been paid any part of that claim?

A. None.

Q. Oh, have you performed all of the terms and conditions of that contract? I mean, the plaintiff, Mr. Lindsay?

A. Yes.

Mr. Harmon: That is all. You may take the witness.

Mr. Licking: I object to the answer as opinion.

Cross-Examination

By Mr. Licking:

Q. Your original claim in this matter was made to Mr. deLappe, the supervising architect, was it not?

A. I didn't get the first part of it.

Q. I say, your original claim in this matter, that is, your [60] original statement of the amount you then considered due under the contract, was made first to Mr. deLappe, the supervising architect?

(Testimony of Ray T. Lindsay.)

A. I think so, yes.

Q. And the claim which you made to him, that is, the items you set up there and the items you subsequently thought up, have been the same?

A. Yes.

Q. And are still the same through now, up to the time you appealed finally from the last decision of the officers?

A. That is right.

Q. Now, do you recall whether ever at any time in your claim you ever referred in your claim to any direction to install piecemeal, accompanied by a threat to put other plumbers on the job, except the conversation about November 20?

A. I don't think I ever wrote.

Q. That was the first statement of anything of that sort?

A. I think so, yes.

Q. In writing. And that is the statement appearing in 6-A here which was filed on April 26 with Mr. deLappe and that sets out the delivery dates, also, doesn't it?

A. Yes, I think so. Yes.

Q. Maybe, probably if you had that when I am talking about it—that is Exhibit 6-A.

Mr. Harmon: Which page of that exhibit are you referring [61] to?

Mr. Licking: Well, Exhibit 6-A, the first page: April 26, 1943, the first claim that went to the architect.

Now, that was the claim concerning which you haven't testified but Mr. Nickel did this morning,

(Testimony of Ray T. Lindsay.)

that there was a discussion about \$35 as the basis. That was the first claim. And then the matter goes on through the various exhibits and there is never any mention in writing by you of any threat or of any direction that if you didn't install the units piecemeal they would put someone else on the job, until the reference to the November 20 date in Mr. Frick's claim when he speaks of Geddes telling him to proceed with the installment of certain materials or they would put other plumbers on the job, and that is the direction to which you have referred in your testimony, and that, as well as your recollection is, is the date that that direction was made, November? A. Yes, I think that is right.

Q. Now, with reference to this item of some \$891, appearing in Exhibit 8-A, page 3, at the time you presented that claim, why, you apparently just multiplied the sum you had to pay Frick, \$5,942.27, by 15 per cent and got the \$891.34?

A. That is right.

Q. That was your method of arriving at it?

A. Yes.

Q. The basis of that claim at that time was that under the [62] contract you were entitled to 10 per cent over your costs and you figured that 5 per cent would take care of the other expense items in that connection? That was what Mr. Nickel just testified to this morning and that is the case, isn't it?

A. We just applied the 15 per cent without any attempt——

(Testimony of Ray T. Lindsay.)

Q. Where did you get the 15 per cent?

A. That was the customary per cent which we had applied on all change orders up to that time.

Q. What did the contract call for?

A. I think 15 per cent.

Q. Did the contract not provide 10 per cent?

A. I don't recall. I think it was 15 per cent.

Q. But at any rate, that kind——

A. We followed the same procedure as we have had on all previous change orders.

Q. That was a claim under the contract?

A. That is right; for additional work performed.

Q. As a matter of fact, it was profit, wasn't it?

A. Well, that was the profit and overhead and profit on additional work performed. Whenever we had a change order for the Government we supported it by a breakdown in which, to which was added this 15 per cent.

Q. Frick was a subcontractor then?

A. That is right.

Q. And your subcontractor was Frick, as I understand it, from [63] your—from the statement ascribed to you in the various exhibits. You had a cost plus contract with Frick?

A. That is right.

Q. That is, Frick was entitled to his actual costs and some figure which is represented in what he turned in to you, that is, the total overall cost of some \$13,000 for the work that Frick did?

A. That is right.

(Testimony of Ray T. Lindsay.)

Q. You yourself did none of that work?

A. We did none of it.

Q. You didn't do any of it, so this \$891.34 is, so far as it appears here, a figure that you got from applying the usual figure for extra work under your contract, right?

A. That is right. Of course, our overhead also went on as long as the contract went on and of course that is——

Q. And the duration of the contract going on wasn't determined by the fact that these particular items were or were not delivered to the contract as a whole? It had other factors that held it up, did it not?

A. There were, but this was the principal one.

Q. This was the principal, but think about the matter of delivery of lumber, for instance. Just think back over it.

A. We had no delay for lumber or anything else comparable to this.

Q. You didn't have any delay for lumber? [64]

Mr. Harmon: If Your Honor please, counsel has the habit of interrupting the witness.

Mr. Licking: Yes. I am sorry. I apologize for it.

Q. You are quite sure you didn't have any delay for lumber?

A. I didn't say—we may have had some delay; we had delay on plywood and we had delay on lumber; we had delay on priority. We received no priority. We went ahead and worked for three weeks

(Testimony of Ray T. Lindsay.)

or a month without priority, as an evidence of our willingness to get the project done.

Q. Did you, you were just saying to the Court that the main delay in the construction in this case was the failure of delivery of these particular relatively few items?

A. I say it was the principal.

Q. It was the principal?

A. Principal source of delay, yes.

Q. Now, calling your attention now to September 5, 1942, and your attention particularly to 5-A, Exhibit 5-A, that was your first written request for an extension of time or any consideration on this job, as I get the record. That is correct, isn't it, your first written request? A. That is right.

Q. And that was September 5, 1942?

A. That is right.

Mr. Licking: Now, as I understand the situation, we have stipulated that these fixtures, the delay in furnishing which [65] is the basis for this action, were requested by the contractor to be delivered August the first?

Mr. Harmon: That is right.

Q. (By Mr. Licking): And it was on the basis of this request that you got an extension of the contract time, did you not?

Mr. Harmon: What request are you speaking of?

Mr. Licking: Their request of September 5.

A. Our answer to that was that they could not

(Testimony of Ray T. Lindsay.)

consider an extension of time at that time but finally, after the whole contract was over, why, they did arrive at an extension of time to cover the whole thing but their letter to us in answer to this——

Q. This is September 5, 1942, the date of this letter. It just occurs to me that you don't make any claim there on account of the failure of delivery of this particular material here.

A. We hadn't received but very little of it on September 5.

Q. It was due to be delivered August the first, was it not?

A. That is right. This was simply not for damages, just for extension of time. It had no connection with damages.

Q. But at that time, at any rate, you didn't mention this failure of delivery of material to which you now say it was the principal cause of delay in the final completion of the job?

A. No. We mentioned only the items that were concerned with the extension of time. [66]

Q. I say, you didn't——

The Court: Just answer the question. You made no——

A. I made no mention of any damages in this letter, no. I did mention, however, that we were waiting for plumbing fixtures which would contribute to the extension of time.

Q. (By Mr. Licking): But at that time you

(Testimony of Ray T. Lindsay.)

couldn't complete the houses, you didn't have the lumber for the houses? A. No.

Q. What difference at that time did it make if you had plumbing fixtures or not?

A. At this time the project was very far along. We hadn't known, but we simply cited the shortages which had occurred which would justify our asking for an extension of time.

Q. But at that time if you had had the plumbing fixtures at that time, you couldn't have installed them anyway, could you?

A. Oh, yes. We could have started a good many of them.

Q. You could have started a good many of them, but as a matter of fact, you didn't have half of the houses completed?

A. Well, we had some houses completed.

Q. You had some houses completed but that would have been piecemeal?

A. Yes, we would have had to install them piecemeal. That is right.

Q. In other words, at this time if you had had the plumbing fixtures you could not have installed them en masse at that time? [67]

A. That is right.

Mr. Licking: That is all.

Mr. Harmon: Is that all?

Redirect Examination

By Mr. Harmon:

Q. Mr. Lindsay, the houses that you had com-

(Testimony of Ray T. Lindsay.)

pleted, they were entirely completed, were they not? So that you could have installed, if you had had the plumbing fixtures you could have installed them complete for each house?

A. Yes. We had the houses completed far enough long, for example, on September 22, where we could have installed—we would have completed 84 installations as of that time, and in our letter of September 22 we bring that out.

Q. Isn't it true that the big evil that you complain of here is the fact that you couldn't install a given house completely because only part of the fixtures for a house came at a time?

A. That is right.

Mr. Licking: That is a leading question.

Mr. Harmon: Yes, it is. I am sorry.

Mr. Licking: I don't know why you should feel sorry. It was nicely done.

Q. (By Mr. Harmon): Now, I direct your attention, Mr. Lindsay, to this same letter to which counsel has referred you and particularly to the paragraph at the very bottom of the page 1.

Mr. Licking: Where is this, counsel?

Mr. Harmon: Exhibit 5-A, page 1. [68]

Q. And also, does that refer to the plumbing items?

Mr. Licking: What it refers to would be explained by the quotation from the letter itself.

Mr. Harmon: I am merely pointing this out because you didn't seem to be able to find any reference to these particular shortages.

(Testimony of Ray T. Lindsay.)

Mr. Licking: You are asking his opinion about what something refers to. I have no objection to your reading it.

Mr. Harmon: All right.

Q. Will you read that particular paragraph beginning at the bottom of page 1 in this letter?

A. This does not apply to the plumbing fixtures.

Q. All right. Then refer to page 3 of the same letter, the fourth paragraph from the bottom. Does that refer to the plumbing fixtures?

A. That is right.

Q. Please read that.

A. "At the present time the plumber is awaiting delivery of plumbing fixtures which are being furnished by the Government. He is being delayed in making installations in units ready for them."

Mr. Harmon: That is all.

Mr. Licking: I have no questions.

Mr. Harmon: The plaintiff rests, Your Honor.

Mr. Licking: If the Court please, at this time I move to [69] strike the evidence that has been introduced either under the theory that he has introduced it, to prove what has been introduced in evidence, a claim for services under the contract, or what has not been introduced in evidence, a claim for damages. The contract itself which is in evidence and on the basis of the contract as the basis for that motion. I won't argue the motion any further because there is on both points some—I wouldn't say conflicting, but some confusion in the

cases, and I believe that the case is one which probably should be presented to the Court and briefed.

The Court: Motion denied.

Mr. Licking: Yes. May I have an exception? May I have the Court's indulgence for about two minutes?

The Court: You want a recess?

(Recess.)

Mr. Licking: If Your Honor please, I believe I will be able to conclude the government case with one witness. There is a stipulation that I have in mind.

Counsel, you remember the other day we looked at these daily inspection reports. Mr. Geddes was there and said it was his signature on the reports where they were signed. I propose to use these as the basis—I couldn't get Mr. Geddes today. I have no question about that.

Mr. Harmon: Can we put these on?

Mr. Licking: Oh, yes. This morning Your Honor spoke [70] about certain requisitions, mass purchase requisitions, those covering the particular material, the defendants were to supply, which is the basis of this action. These four——

The Court: They are offered?

Mr. Licking: ——are proper exhibits. Well, I understand that the plaintiff is offering them, Your Honor.

Mr. Henderson: Yes. They should be in the plaintiff's case.

The Court: Very well.

(Thereupon the requisitions referred to were received in evidence and marked Plaintiff's Exhibit No. 8.)

F. ALLEN TAYLOR,

called as a witness on behalf of the defendant, and having been duly sworn, testified as follows:

The Clerk: What is your full name?

A. F. Allen Taylor.

Direct Examination

By Mr. Licking:

Q. Mr. Taylor, you have been in court during the taking of testimony in this case and are familiar with the contract referred to?

A. Yes, sir.

Q. You know Mr. Lindsay and his firm or partnership, the plaintiffs here? A. Yes. [71]

Q. And also know Mr. Nickel who testified?

A. Yes.

Q. Were you yourself concerned with the matter of the contract referred to? Were you employed in and about the contract in and about the project?

A. Not on the project. I was employed in the regional office.

Q. In the office of what agency?

A. Of the Federal Public Housing Authority.

Q. In what capacity?

A. I was a construction engineer in the claims section of that agency.

(Testimony of F. Allen Taylor.)

Q. As such, was it part of your duties to pass on the claims concerned with contracts such as the instant contract?

A. I prepared findings for the contracting officer.

Q. With reference to the particular claim here involved, did you prepare the findings in that case?

A. Yes, that is correct.

Q. Did you examine the supporting data furnished by the claimant? A. I did.

Q. At that time what was furnished, if you recall?

A. There was nothing—the claim was—beside the claim itself, there was nothing in the way of supporting data submitted by the contractor.

Q. Calling your attention now to Exhibit 6-A?

A. Yes.

Q. And referring particularly to page 5 of that exhibit 6-A? A. Yes, sir.

Q. That was the only data submitted at that time by the contractor?

A. Yes. That is the statement from the plumbing company to the prime contractor and the prime contractor's statement to the Government.

Q. Which is Exhibit 6-B?

A. Yes. Those exhibits or items accompanied the claim and that is what was submitted.

Q. There was not at that time furnished any supporting ledgers or any supporting time cards?

A. No, no time cards or ledgers was submitted with the claim in supporting of these figures.

(Testimony of F. Allen Taylor.)

Q. In other words, the claim was merely the invoice from the subcontractor to Lindsay, the main contractor, and Lindsay's computation of his profit and overhead added to that?

A. Statement to the Government; that is correct.

Q. Now, am I correct in stating that the general theory of the claim was an overrun on estimated cost of plumbing installation?

A. That is what the——

Q. General?

A. What the statement shows. [73]

Q. Generally speaking, the claimant stated and supported by Frick that Frick's original contract had been based on an idea of \$35 per unit for the installation of plumbing fixtures and that that was based on what he assumed to be a general custom and assumed to be an agreement that such fixtures would be delivered so that they could be installed in one trip?

A. Yes.

Mr. Harmon: Just a moment. I object.

Mr. Licking: I am just trying to summarize.

The Court: He says that the only data is what is before him. There is no occasion for any further construction to be put on it.

Q. (By Mr. Licking): Now, you made a computation with reference to that claim?

A. That is right.

Q. And in making that computation, did you have other data before you other than that submitted by the contractor?

(Testimony of F. Allen Taylor.)

A. Yes. We have had the regional office records which consisted of copies of the plumbing subcontractor's payrolls and we had copies of daily reports made by the architect, reported daily on the progress of the job.

Q. And the supervising inspector?

A. The supervising inspector, the architect.

Q. That daily report of the supervising of the work, to show what the contractor, subcontractors were doing on the job as [74] observed by the inspector?

A. That is correct. It is in the form of a diary.

Q. Is this that?

A. This is a set of the supervising architect's daily reports.

Q. Now, I note from Exhibit 6-A——

Mr. Licking: For convenience, Your Honor, I have given the witness a copy of the exhibit so that he may have that copy and refer to it in order to shorten the matter.

Q. Now, referring to 6-A, we have first there a statement of delivery dates beginning on page 1; that is, the oil heaters were delivered on August 4, and so on, with the other items.

A. Let's see. Page 1?

Q. Page 1 of 6-A. A. That is right.

Q. Now, with the inspection reports you have and the data submitted by the claimant, you state that you made an estimate or what was it you termed your findings?

(Testimony of F. Allen Taylor.)

A. I made my estimate from the actual copies of the payrolls which we had in our office and comparing that with the number of men and so forth that the inspector said were on the job on these various days and making a schedule as to what these various number of plumbers were doing on those days that they were on the job.

Q. The inspector's reports showed that?

A. The inspector's reports showed that. [75]

Q. Now, from that report what difference, if any, did you evolve between the statement submitted by the contractor and your findings?

A. May I refer to a copy of the figures that I used in my——

Q. Surely. That is, I haven't any objection. I guess counsel hasn't?

A. This is—I took the entire plumber's payroll which was approximately \$78,000. I had that together with—And I divided that into three periods. I took the first 13 payrolls which was up to the week ending September 23. That is approximately when the plumbing fixtures were first delivered. And that part of the plumbing subcontractor's payrolls was \$54,000 up to that date. You see, in analyzing his payrolls, he did a good deal of other work besides install plumbing fixtures. Installing the plumbing fixtures was a small portion of the \$78,000. He had a lot of site work and installation of water system and stoves and some sheet metal work, I think, which all bears out by comparing the actual payrolls with the inspector's reports.

(Testimony of F. Allen Taylor.)

Q. You first began to consider payrolls on this installation as of September 23? A. Yes.

Q. Now, in that connection, I call your attention to Exhibit 6-A, page 1 of Exhibit 6-A.

A. Yes. [76]

Q. The first of these materials which have caused this controversy were the oil heaters. They were delivered August 4. I note the statement there—and this is the statement of the claimant—that that installation started September 26?

A. September 26.

Q. Where did you arrive at the figure of September 23? Did you feel there may have been some work before the 26th?

A. Well, the inspector stated in his diary of September 21 that a foreman and two plumbers started installing lavatories—no. Started to install fixtures on that date.

Q. Started to install fixtures? He didn't say what kind of fixtures?

A. Yes, he did. He says so exactly. I may have it here.

Q. Let's see what he says. How does this run, from the top to the bottom?

A. He said, the reports show that a foreman, that two plumbers and a foreman started installation of heaters on September the 25th, 1942. Then reports later on show that the installation of sinks and lavatories started on October 20, and those dates seem to be consistent or substantially so with all the other correspondence and letters in the claim.

(Testimony of F. Allen Taylor.)

Q. In Exhibit 6-A it states that the lavatories were received on October 21?

A. Yes. The inspector's report is consistent with this page 1 of Exhibit A because the inspector specifically states that the [77] foreman and two plumbers started on September 25, where this Exhibit 6-A says that installation of water heaters started on September 26. So it was on that basis that I made that division in the amounts of the total payrolls.

Q. In other words, just so I can understand your testimony, you credited none of the plumbing payrolls to installation of these fixtures before the fixtures were received?

A. That is correct. Shall I continue?

Q. Yes. If you will, continue.

A. Then the second—then, I had a second period. It was from—the second period began from September 24 to November the 4th.

Q. To November the 4th?

A. Yes. And I took that date, that period of payrolls, 14 to 19, because they are the dates in which I have in the architect's daily report detailed daily information as to what the plumbers were doing that were on the job. The total payrolls from that period from September 24 to November the 4th—that is, payrolls 14 to 19, inclusive—were \$16,000. And I made a list of the days that the architect representative stated that plumbers were working on the installation of plumbing fixtures.

Q. That is, is that the plumbing fixtures covered by these four requisitions?

(Testimony of F. Allen Taylor.)

A. That is right. And by comparing that with the number of plumbers and the number of foremen—for instance, for example, [78] one day he would have four plumbers—four foremen and 20 plumbers putting in sewers and water and testing the water and sewer system. He would have one plumber and three foremen installing fixtures. And by taking that information and comparing it to the payrolls, I made a list and struck an average. That is the best I could do. And I averaged for that many days during that period an average of 1 foreman for 33 days and 4 plumbers each for 33 days, and then averaged here for 33 days. And then I took one-seventh of the administrative costs as was shown in the claim. I took those figures in the claim and the payroll.

Q. Pardon me; just one question. May I interrupt you a moment? You regarded this as a claim under the contract?

A. I regarded it as a claim for additional work under the contract.

Q. And as such you considered the figure of overhead and profit?

A. Yes; yes. In making this estimate by taking the average for that 33 day period of which his total payroll was \$16,900, I reasoned that his probable expense for installing fixtures in that period was \$3372.

Q. Now, at this time you were furnished by the contractor with nothing except the statement that is in connection with 6-A and 6-B?

(Testimony of F. Allen Taylor.)

A. That is true. I had his claim statement and the payrolls [79] and the architect's reports.

Q. Payrolls and architect's reports?

A. And other progress reports; and by comparing those reports——

Q. And that time you didn't have the ledger sheets from Frick or you didn't have the time cards?

A. No ledger sheets or time cards or any other information.

Q. Have you prepared a resume of your findings in that connection, that is, of your first findings? A. Yes. Since——

Q. No, not since. Have you there a resume of your findings with reference to the first claim?

A. Yes. That is what I was——

Q. May I see this?

A. It is on the last of those three sheets.

Q. That is the last three of the sheets? This is your findings? A. Yes.

Q. Beginning on page 12, the page that is marked 12? A. Yes.

Q. 13 and 14? A. Yes.

Q. That is your findings. Now, that finding was based on the claim submitted by the claimant, that is, Exhibit 6-A and 6-B? A. That is true.

Q. And on this, these reports by the supervising—— [80] A. That is right.

Q. ——the inspector or supervisor for the architect.

(Testimony of F. Allen Taylor.)

Mr. Licking: At this time, if the Court please, I would like to mark these for identification as a basis for part of the report.

The Court: Defendant's Exhibit for identification, A.

(Thereupon the document referred to, resume of findings, was marked Defendant's Exhibit A for identification.)

Q. (By Mr. Licking): Let me see the report. Would that be page 11?

A. Yes; page 11 it would be.

Q. (By Mr. Licking): This, then, from page 11 on is a summary of your findings in the matter?

A. Yes.

Q. Does that conclude it there?

A. Oh, no. You have to have this sheet. The top of that sheet is the final total of 2696.

Q. The final total? A. Yes.

Mr. Licking: I apologize to the Court for taking this time. I had some data prepared with something else in mind.

Q. Well, this material which I now show you is in fact a copy of the pertinent portions of your report in the matter?

A. That is correct. That is. That shows how I arrived at the sum of — [81]

Q. At the final figure which was the figure set out in the supervisor's, immediate supervising officer's recommendation?

A. Allowance; that is right.

(Testimony of F. Allen Taylor.)

Q. Allowance? A. Yes.

Mr. Licking: Counsel, I think probably for convenience of the Court, that is a partial copy of the report made by the witness, if the Court please. It sets out these more or less involved situations. I would like to have counsel look it over. I think it would assist the Court if it were admitted as a summary of the witness' evidence and I will offer it for that.

Mr. Harmon: Just a moment. We would like to examine this before he goes on.

Mr. Licking: Surely. I thought I might pass on while it was being examined.

Mr. Harmon: We can examine it and take care of it.

Mr. Licking: I thought one of you might clear up the evidence——

Then may I have a short recess in the matter?

Mr. Harmon: Did I understand you to say you were offering this?

Mr. Licking: It is a partial copy of the report.

Mr. Harmon: I won't object to it on that ground.

Mr. Licking: You had seen the report made before and he states the basis of his findings in the matter and I have given [82] the original basis of his findings, that is, the architect's reports. They are before the Court for identification.

Mr. Harmon: If you are making an offer of this, I want to make an objection.

Mr. Licking: Very well. I will offer it.

(Testimony of F. Allen Taylor.)

Mr. Harmon: I object to it, if Your Honor please, on the ground that it is irrelevant and immaterial. It is pure conclusion on matters that the Court has to decide.

The Court: Well, I understand counsel was offering it because it was in effect a summary of what——

Mr. Licking: Of the witness' testimony.

Mr. Harmon: Well, the witness has been here in person and has testified.

The Court: There is no foundation for it. It isn't an official record. It hasn't been shown to be an official record.

Mr. Licking: Well, if the Court please, the official records—however, this is an excerpt from the official report made by the witness and I——

The Court: I think the objection is good. Sustained.

Mr. Licking: Well, probably so.

Mr. Herman: Are you going to examine him any more along this line?

Mr. Licking: Yes.

Mr. Harmon: I will wait until he gets through.

Mr. Licking: Not more along this line.

Q. Now, since making the report to which you have testified and arriving at the——

Mr. Licking: The witness has used this as a summary of his testimony. I would like to have the witness express the conclusion, using this to refresh your recollection.

(Testimony of F. Allen Taylor.)

Q. If you will state to the Court what you found on your examination of the claims submitted by the plaintiff here and what report you made to your immediate superior in that matter.

Mr. Harmon: I will object to that question as irrelevant and immaterial, calling for the conclusion of the witness as to what he found.

Mr. Licking: Well, if it does call for the conclusion, I think he is the person who can express a conclusion. He is the person who did find it.

The Court: Overruled.

A. I am not sure that I understand the question.

Q. (By Mr. Licking): Not using that—I had, frankly, intended to introduce that to save time and save the record—using that to refresh your recollection on what you did in the course of your official duties, state what you did in terms of dollars and cents with reference to the plaintiff's claim.

A. Well, I have already told of how I divided the total payrolls into three periods, first, \$54,000, I didn't consider any of it was expended in installing plumbing fixtures. The second [84] period, payrolls 14 to 19, the total payroll amount was \$16,900, and by use of the inspector's report compared with the payrolls, I figured that out of that amount \$3372 was the amount of that \$16,000 expended on installing plumbing fixtures. Then, the third period, that is beginning with November the 5th to the

(Testimony of F. Allen Taylor.)

end of the job—and that was payroll No. 20 to 30—the balance of his payrolls amounted to \$7,080.99. Out of that I had to make an estimate of the amount that was spent on plumbing fixtures.

Q. That is installation of plumbing fixtures?

A. And the installation of plumbing fixtures. And I found by looking at the architect's report that the efforts were largely confined during that period to roughing in at the buildings and installing stall baths furnished by the contractor himself under the contract and to work on the sewers and water mains. And, let me see. Wait a minute. That is right.

Now, I have these papers out of order.

And I found that there was sufficient data in the architect's report to indicate that at least 20 per cent of that payroll for that period, \$7,080, was expended in completing and making the required tests for the rough plumbing of the buildings and installing the showers and doing other work but this applied to the installation of the plumbing fixtures. In other words, I gave him credit for 80 per cent of that \$7,000 during that last period. That last period the architect changed [85] inspectors or something and his reports weren't as specific as they were before, so I had to estimate from the other work that was shown that he was doing that, at least. I gave him credit there for 80 per cent of that, which amounted to \$5420. That is after I deducted \$245 labor that he was paid for extra

(Testimony of F. Allen Taylor.)

work. That would come out of his payroll. So I added the \$5420 to the \$3371 and got his, my estimate of his labor cost of installing the fixtures of \$8792. To that I added compensation insurance at the rate shown on the subcontractor's invoice and arrived at \$8975.75.

Then from the contractor's statement that the work should have cost him \$7105, I show an apparent overrun in the labor cost of \$1870.75. And to that I added the subcontractor's overhead of 8-91/100 per cent, and I have taken that from his invoice.

In addition to administrative expense already included in the payroll cost, that was \$166.

To that I added 15 per cent overhead and profit for the prime contractor, which was \$305. Then I added social security and old age benefits. That is 4 per cent of the labor cost, \$351. And I arrived at a total figure of \$2694.72.

Q. Now, subsequent to that time, since you made that estimate, have you been furnished with any further data? A. Yes.

Mr. Harmon: I think at this time, if Your Honor please, [86] I should make my motion to strike all of the testimony of this witness upon that subject as a conclusion, as pure conclusion of the witness.

The Court: I think not. There is involved writing there. In view of the fairness of this action, and the contracting officer—you challenge his action

(Testimony of F. Allen Taylor.)

as being capricious and arbitrary and this is a direct refutation of that. The motion is denied.

Mr. Harmon: An exception, please.

Q. (By Mr. Licking): Now, since the time you have made the figures to which you have just referred, have you been furnished with any other supporting data?

A. Yes, we have. Yes, sir.

Q. What was that?

A. We have been furnished the contractor's time cards and ledger sheets which are in that box.

Q. Time cards and ledger sheets?

A. Yes, sir, and from those we have——

Q. Now, can you state whether or not from that material supplied by the claimant and the material heretofore supplied, can you state whether or not you have arrived at a conclusion as to the amount, if any, due the claimant under this contract?

A. We have prepared——

Mr. Harmon: Now, that question calls for a yes or no answer. [87]

Mr. Licking: Yes.

Q. Have you arrived at such a conclusion? Have you arrived at such a conclusion? Have you made another estimate?

A. Yes, we have. We have made another estimate.

Q. Can you state whether or not that estimate is different than the estimate you made in the first instance or whether you arrived at the same conclusion? A. It is different.

(Testimony of F. Allen Taylor.)

Mr. Harmon: I object.

Q. (By Mr. Licking): It is different. Can you state whether or not it is more or less than the original estimate?

A. It is less than the original estimate.

Mr. Harmon: If Your Honor please, I object to these questions as irrelevant and immaterial. They are conclusions of the witness.

Mr. Licking: Well, the witness has testified that he is an expert in this particular line, that this is his business, to make this type of estimate.

Mr. Harmon: I haven't heard any such expert testimony.

Mr. Licking: Do you question his——

Mr. Harmon: Not based on the costs at all. It is based on his conjecture.

Mr. Licking: It is——

Mr. Harmon: And opinion.

The Court: It is based upon whatever data he had. [88]

Mr. Licking: The data is here.

Mr. Harmon: But the data is here; the books and the records are here.

Mr. Licking: Well, you are available to cross examine him with reference to those.

The Court: He had to arrive at some conclusion and he was explaining how he arrived at that conclusion and on the basis of his conclusion it seems to me that is matter going directly to the fairness of the award that was made.

(Testimony of F. Allen Taylor.)

Mr. Harmon: Exception.

Mr. Licking: That is the basis on which they are offered.

Q. You have arrived at a different conclusion after examining this data, particularly the time cards and ledger sheets? A. I have.

Q. Now, would you state what steps you went through and what you considered in reaching that conclusion? First, what you did.

The Court: When did you do this?

A. We did this during the past week, or since this case was first called. We went over the time cards and made an analysis of the cost as shown on the time cards and ledger sheets and divided it into the same periods or dates from which I made the original estimate, for purposes of comparison; that is, installation costs during those periods.

Q. (By Mr. Licking): Did you use the same periods as in the [89] time cards and the data supplied by the claimant?

A. The time cards showed the same periods and we took off of the time cards and ledger sheets the amounts which the contractor used to make up his \$13,000 which he claimed to be the cost of installing the fixtures.

Q. That is the claim set out in Exhibit 6-A and 6-B?

A. Yes. We took all of the items as near as we could that were pertinent to installing the fix-

(Testimony of F. Allen Taylor.)

tures and added them up, but instead of getting \$13,000 we actually got \$15,000. Maybe—I don't know which items—there is a lot of items on there, you see, that comprise the cost of installing the fixtures, but we took them off of the time cards, the daily time cards, which also—the same amounts show on the ledger sheets.

Q. Yes.

A. They were either posted from one to the other, I don't know which way they were posted, but posted from one to the other.

Q. The total amount——

A. The total of \$15,000; and we broke that amount up into the same periods of time which I had originally taken the contract. In other words, we took the first 14 payrolls. Then we took 15 to 19, then from 20 to 30; the payrolls. And what we found was that on the first 13 payrolls——

Q. Now, that particular examination, your last examination of the matters which have been identified here, the ledger sheets and the time cards submitted by the claimant here, you have [90] reduced that to a report? A. That is right.

Q. And that is what you are testifying from here?

A. We made an analysis and comparison. Then we made a written report.

Q. Did you arrive at a definite conclusion as to the amount, if any, due the claimant for a so-called override on installation costs?

(Testimony of F. Allen Taylor.)

A. Yes. We found that on the time cards, that on the contractor's payroll cards, for the first 16 payrolls—that is all of the costs for installing the fixtures prior to October the 20th, 1942, the total cost was \$9524.01.

Q. That was prior to October 20?

A. That was prior to October the 20th.

Q. Now, at that time, do you recall what fixtures, if any, had been furnished them and could have been installed prior to that time?

A. Prior to that—that was the date of the delivery of the plumbing fixtures, or about that date.

Q. Well, prior to that time the oil heaters and the water heaters had been delivered?

A. Oh, yes. Prior to that time the oil heaters and water heaters had been. Some had been installed, but the \$9500 figure does not include that. In addition to that \$9500, there was expended, beginning back on payroll 6 they started with a \$20 expense installing water heaters, and during that first 13 payrolls they had \$80. I didn't add that in. I only added up the cost of what is represented to be the installation of the plumbing. The time cards don't say plumbing fixtures. They say plumbing installation or unit installation, which we figured was the installation of the plumbing fixtures. So I take only the items which refer to installation of the plumbing fixtures, and we find that they amount to—that is exclusive of the water heaters and the ranges—we find that that amounts to \$9524 before the fixtures were delivered.

(Testimony of F. Allen Taylor.)

Q. In other words, there is a charge on the time cards apparently made for the installation of fixtures of some \$9400 before the fixtures were delivered? A. That is right.

Q. And what period of time is that?

A. That is on the first 16 payrolls up to and including October 20, I believe.

Q. Up to and including October 20. Do you find any other difference or discrepancy?

A. Then I made a notation that the statement of facts show that the fixture installation began on October 20 or 21, 1942, and by means of averages taken from the architect's reports \$3372 was expended for this purpose, but the contractor's payroll cards claim \$2294 on payrolls Nos. 14, 15 and 16 was spent for installing fixtures, which was prior to the date of their [92] delivery; and \$1881 after October 21, plus \$624 for water heaters and \$290 for gas range installation, making a total of \$2797. That figure would be in comparison to the \$3372 which we set out in our allowance.

Q. (By Mr. Harmon): Is that the second period you are speaking of?

A. That is the second period. Then payrolls 20 to 30, the statement of fact estimates that the fixture installation cost during this period was 80 per cent of the total period or a net of \$5420. The contractor's payroll cards show that this expense was \$2815.59, or \$2604.41 less than estimated by the Government.

(Testimony of F. Allen Taylor.)

Then a summary of the comparison is as follows: The first period no fixtures were installed except water heaters, \$80.85.

The second period, contractor's costs after 10-20-42, the date of the first fixture delivery, including water heaters and gas ranges, \$2797.20.

The third period, costs represented by the contractor's payrolls, \$2815.59.

Total, \$5693.64 plus, for the community building, \$109.98.

Cost to contractor, \$5803.62.

From those figures it is apparent that the cost of installing, the actual cost of installing the plumbing fixtures was \$5803.52 instead of the \$13,000 or instead of the—that the contractor claimed—or instead of the \$8792 that the Government first estimated. [93]

Mr. Licking: May I ask a question, Your Honor? I don't recall whether these ledger sheets and time cards were given numbers.

The Clerk: No. 7.

Mr. Licking: May the ledger sheets be called 7-A and the time cards 7-B? That would be more convenient to refer to them. If you haven't any objection to that?

Mr. Harmon: No.

(Thereupon the ledger sheets and time cards in Plaintiff's Exhibit No. 7 were marked 7-A and 7-B, respectively.)

Q. (By Mr. Licking): Well, then, your pres-

(Testimony of F. Allen Taylor.)

ent conclusion, based on the data supplied by the claimant, is that on the claimant's——

Mr. Harmon: What was that question? Will you repeat it?

Mr. Licking: I said, your present conclusion based on the data supplied by the claimant or plaintiff and that which you already had is different than your original conclusion expressed in the report to which you have testified?

A. That is right.

Mr. Harmon: I object to that, if Your Honor please, and ask it be stricken on account of it is irrelevant and immaterial.

The Court: That is the only deduction that can be drawn from his testimony. It is just a summation from his testimony.

Mr. Licking: Yes. [94]

Q. What is the difference?

A. The difference——

Q. I think that is—presently, do you find, on the basis of the data submitted by the claimant here and your interpretation of it in the light of the data you had——

The Court: It is a matter of subtraction, isn't it?

Q. (By Mr. Licking): And the claim——

The Court: He just gave the figures.

Mr. Licking: I will ask him. I didn't understand him to testify to the figures.

The Court: Yes, he gave the figures. Take one away from the other and you have it.

(Testimony of F. Allen Taylor.)

Mr. Licking: That is true. It is a computation the Court can make. Well, don't bother.

Q. It is a matter of computation from your statements and what you have testified?

A. That is right.

Mr. Licking: I should like, for the convenience of the Court, to offer a summary statement which the witness has testified to.

Mr. Harmon: I object to it on the ground it is irrelevant and immaterial.

The Court: Sustained.

Mr. Harmon: Conclusion of the witness. I want to use that in examining the witness. [95]

Mr. Licking: Not sustained on the ground it is a conclusion of the witness?

The Court: No; immaterial.

Mr. Licking: I have no further questions.

Cross-Examination

Mr. Harmon: May I take the statement, please?

Mr. Licking: Surely.

Q. (By Mr. Harmon): Mr. Taylor, referring to your first findings that you testified to here, you accepted the figures of the contractor as to the reasonable costs that would have been involved had the fixtures been delivered and installed at one time, is that right?

A. We used that in making our——

Q. Yes. So that the only dispute between your conclusion and the claim at that time was based

(Testimony of F. Allen Taylor.)

on whether or not the figure of \$13,000-odd was correct? A. I am not so sure.

Q. You can answer that yes or no, can you not?

A. I am not sure that that was the only consideration there.

Q. Well, isn't it true that you arrived at your conclusion by deducting the \$7100-odd from the amount that you computed? A. Oh, yes.

Q. Rather than from the \$13,000?

A. That is right. [96]

Q. So that the only dispute between you and the claimant as of that time was whether or not the \$13,000-odd figure should be accepted?

A. That is right.

Q. Yes. Now, in your latest conclusion you have come to the opinion that the cost of these installation was even less than the \$7100 figure, is that right? A. Yes, that is right.

Q. And that notwithstanding the fact that those fixtures were delivered piecemeal over a period of several months involving substantial extra time during the rainy season, is that right?

A. That is right.

Q. Now, Mr. Taylor, when this claim was referred to you for your examination, what was the data that you say you based it on?

Mr. Licking: Which time, counsel?

Mr. Harmon: I am referring to the first examination.

A. The statement was submitted by the contractor, the plumbing contractor's payroll.

(Testimony of F. Allen Taylor.)

Q. (By Mr. Harmon): That is a copy of the payroll furnished to you?

Mr. Licking: Let him finish his answer.

A. Yes.

Mr. Harmon: Beg your pardon.

Mr. Licking: He hadn't finished his answer. [97]

Mr. Harmon: I merely wanted to make it more certain. I was not trying to change the tenor of his thinking.

Q. Those two things are what you based it on?

Mr. Licking: He hasn't finished his answer.

A. No. There was another thing. I have daily reports of the architect.

Q. (By Mr. Harmon): Do you know where those—that payroll came from?

A. The payroll.

Q. Yes.

A. The payroll, each contractor is required under the contract to submit a copy of his payroll to the Government, and they are in the Government's file.

Q. Yes. You know, as a matter of fact, or do you recollect, Mr. Taylor, that at that time the Government's copy of the payroll had been mislaid and that it was necessary for the contractor——

Mr. Licking: What difference does it make, counsel, if it had or hadn't? There was a copy supplied.

Mr. Harmon: This is cross-examination, if Your Honor please, and I ask the right to go into——

Mr. Licking: Cross examine on a matter—what

(Testimony of F. Allen Taylor.)

difference does it make whether the Government's copy had been lost or not? They were supplied by the claimant.

The Court: Proceed. [98]

(Question read.)

Q. (By Mr. Harmon): To supply another copy so you could go into it?

A. There are 30 payrolls. Out of the 30 payrolls we were shy a few. I will say 6. I have the dates. That is in the record, the dates of those that were shy. And we borrowed those six from the contractor.

Q. You needed those to complete your examination?

A. When I made a layout, an analysis of the payroll, I was shy six payrolls and I borrowed those from the contractor and filled in those amounts and returned those that I had borrowed to him.

Q. The contractors?

Mr. Licking: Is this—this is purely irrelevant.

The Court: Overruled.

Q. (By Mr. Harmon): The contractor furnished those payrolls willingly, didn't he?

A. That is true.

Q. You made no request at that time for any other data such as time cards or ledger sheets, did you.

A. Yes, sir.

Q. Did you?

A. Oh, yes. I don't know that at the same time I asked him for the payrolls, but I did of Mr. Lindsay.

(Testimony of F. Allen Taylor.)

Q. To whom did you make that request? [99]

A. Mr. Lindsay.

Q. Which Mr. Lindsay?

A. Mr. Ray Lindsay.

Q. And where was it made?

A. He came to our office. I telephoned him.

Q. You telephoned him for what?

A. I telephoned him to talk about this claim and asked him to submit evidence that we could work from.

Q. Isn't it a fact that you only asked him for the payrolls?

A. I didn't specify what evidence he should supply to support his claim. We didn't have enough evidence. We didn't have the evidence, all the evidence in the claim, and I informed him of that.

Q. Well, you asked for the missing payrolls, didn't you? A. That is right.

Q. Did you ask for anything else?

A. I didn't specify what else. I don't know what else he had.

Q. All right. And did you—you didn't specifically ask for time cards, then, did you, or ledger sheets?

A. I don't recall asking for time cards or ledger sheets.

Mr. Licking: That is a waste of this time, cross-examination, counsel. I will stipulate to——

Mr. Harmon: I have a right to cross-examine this witness.

The Court: Proceed.

(Testimony of F. Allen Taylor.)

Q. (By Mr. Harmon): Now, Mr. Taylor, when you made your [100] finding there at first, the result thereof was in due course transnitted to the plaintiffs here, wasn't it?

A. That is——

Mr. Licking: That is apparent, if the Court please, from the exhibits on file in the case.

The Court: I think so.

Mr. Licking: That the report was transmitted.

Q. (By Mr. Harmon): Did you have any further talk with Mr. Ray Lindsay or Mr. Claude Lindsay after that report had been made?

A. No, sir.

Q. It is true, is it not, Mr. Taylor, that request was made for information as to the basis on which the claim was broken down and allowance made of \$2600 while the other was refused?

Mr. Licking: I would stipulate that was made and was refused.

Mr. Harmon: Will you?

Mr. Licking: Yes.

Q. (By Mr. Harmon): Now we come down to the later period. You were present in the office of Mr. Licking on one of the days when this case was previously set for trial, were you not? In the presence of Mr. Licking, Mr. Ferguson, myself, Mr. Henderson and Mr. Lindsay? A. Yes, sir.

Q. That information as to how you had arrived at those [101] figures was, had not been supplied up to that time, had it not?

(Testimony of F. Allen Taylor.)

A. Had not been supplied to whom?

Q. To the plaintiff? A. That I——

Mr. Licking: Stipulate.

A. That I can't answer.

Q. (By Mr. Harmon): You recall our asking——

Mr. Licking: I will stipulate it had not been furnished up to this time, counsel. I won't stipulate as to the other.

Mr. Harmon: At this time, if Your Honor please, in order to examine this document that the witness testified from, I would like to ask for a recess for a few minutes.

The Court: I am going to be obliged to adjourn at 4:00 o'clock. Are you going to be able to finish your examination of the witness?

Mr. Harmon: I hope so.

Mr. Licking: The Government has no more evidence.

The Court: Take a recess.

(Recess.)

Mr. Harmon: If the Court please, at this time the plaintiff requires an adjournment to give it a chance to examine into the computation by this witness and the claim that it is based upon the time cards and so on. In that respect, if Your Honor please, I might say this, that at the time the claim was rejected, plaintiff sought information as to the reason for [102] allowance in part and rejection in part. They were refused information. We were

(Testimony of F. Allen Taylor.)

forced to file suit. At all times we have sought to get this thing adjusted. When it was set for trial, we contacted Mr. Licking and when it was put over at that time, we sought with him——

The Court: That is all right. You are asking for an adjournment now. Any objection?

Mr. Licking: Yes, if the Court please, because the adjournment is not an adjournment to look into any statement made by the Government. It is an adjournment to look at their own ledger and their own time cards. The situation presented from the testimony of this witness is that their claim is based, at least one-third of their claim is based for an installation charge during the period of time when there wasn't anything to install, and there couldn't have been this charge, and that shows in their own ledger and they are asking for a continuance to examine their own books.

The Court: Nobody is going to be injured if we have an adjournment until Monday.

Mr. Licking: May we have an adjournment, then, until Monday afternoon, at 2:00 o'clock?

The Court: Yes, Monday afternoon at 2:00 o'clock. Very well.

Mr. Harmon: And may we have permission to withdraw these exhibits? [103]

Mr. Licking: Certainly, as far as I am concerned.

The Court: No objection?

Mr. Licking: There is no objection.

(Testimony of F. Allen Taylor.)

The Court: The Court is in adjournment until Monday morning.

(Thereupon an adjournment was taken until 2:00 o'clock p.m., Monday, October 20, 1947.)

CERTIFICATE OF REPORTER

I, Grace Curtis, Official Reporter, pro tem, certify that the foregoing 104 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ GRACE CURTIS. [104]

Monday, October 20, 1947, Afternoon Session 2:00

Mr. Harmon: Mr. Taylor was on the stand, your Honor.

F. ALLEN TAYLOR

resumed the stand in behalf of the defendant; previously sworn.

Cross-Examination

(Resumed)

By Mr. Harmon:

Q. Mr. Taylor, just what were your duties, what were your duties?

Mr. Licking: You mean at the time——

Q. (By Mr. Harmon): Let's start at the time that this matter was first referred to you. Were you employed by the Government at that time?

(Testimony of F. Allen Taylor.)

A. Yes, I was employed FPHA in the claims section of the regional office.

Q. What did you do in that work, examine claims and figures?

A. Yes, I examined the claims that were presented by the contractors. Those claims first came to our department through certificate releases that the contractors gave. If the contractor gave the Government a certificate and releases in connection with his contract and made any reservations on that, then that reservation would apparently become a claim and we began our investigation then.

Q. You had no actual experience out on the contracting job, that is, out on the project, of any nature?

A. Not prior to investigating claims. [105]

Q. And in this particular claim did you go out on the job and do any examining up there?

A. I went to this project, but not—I had no particular investigation of any construction to investigate out there. I went there to examine the records of the Housing Authority which were at the project.

Q. And when was that?

A. That was—I can't give you the date from memory, but it was shortly after the claim was presented by the contractor.

Q. Now, Mr. Taylor, you recall from the file, but I don't know whether you testified that you had anything to do with that original change order No. 60, I believe it was——

A. That is right.

(Testimony of F. Allen Taylor.)

Q. Did you have anything to do with that?

A. Nothing to do with that, no, sir.

Q. Your work came subsequent to that time?

A. That is right.

Q. Now, it was after that time that you went to the project, you say?

A. That is correct.

Q. And whom did you talk to, if anyone, at that time?

A. I talked to the young lady in charge of the Housing Authority records.

Mr. Licking: It seems to me, if your Honor please, it is immaterial who he talked to. He testified he merely went there [106] to get the records.

The Court: Overruled.

A. I went into the office of the Housing Authority to look through their files, and I talked there only to a young lady, whose name I don't recall now.

Q. (By Mr. Harmon): You didn't talk to Mr. Towers, the project engineer? A. No, sir.

Q. Did you talk with Mr. Geddes?

A. No, sir.

Q. What was his capacity there, if you remember?

A. Mr. Geddes was a representative of the project architect.

Q. And did you talk to Mr. deLappe, the architect himself? A. No.

Q. It is true, isn't it, Mr. Taylor, that at no time

(Testimony of F. Allen Taylor.)

in your connection with the claim, did you talk to any of these gentlemen concerning the claim?

Mr. Licking: Object, your Honor, on the ground it is immaterial whether he did or not.

The Court: Overruled.

A. I didn't consult with them.

Q. (By Mr. Harmon): Now the records show you went there to get—were they these records that are marked Defendant's Exhibit A?

A. Those records—no, I didn't get those at the Housing [107] Authority, but I got those from the architect. I didn't visit him, but I talked to him on the phone and obtained those records from the architect.

Q. What records pertaining to this matter did you examine out there at the project?

A. The payrolls.

Q. The payrolls. Your report was based solely upon your examination of the payrolls and the claim and this document, Defendant's Exhibit A, that you got from the architect?

A. Yes—I would like—I might clarify that: Of course, we had a lot of records in the regional office, such as the project engineer's semi-monthly report. He makes a report called a 377 report that comes in twice a month, reporting the progress and conditions and his remarks as to the progress on the job.

Q. Now, you examined these documents again in connection with the time cards and ledger sheets

(Testimony of F. Allen Taylor.)

just recently, did you not? A. Yes.

Q. And you discovered at that time, did you not, that this Defendant's Exhibit A in general corroborated the time cards?

A. I don't believe I quite understand.

Q. They are in conformity? There is no place here in this Exhibit A which is contrary to what is shown on the time cards?

A. I believe there is a difference.

Q. Well, isn't this the only difference, that this document, Defendant's Exhibit A, does not show all of the time of all of [108] the men that were on the project that is shown on the time cards? In other words, isn't it true that there is more shown on the time cards than there is here in this document?

A. A greater number of employees.

Mr. Licking: That is not with reference to this particular item.

Mr. Harmon: Yes.

Mr. Licking: That is not with reference to this particular item.

Mr. Harmon: Yes, with reference to this particular item.

Mr. Licking: That is, the time cards that were submitted by the claimant show more time, but not on this particular item.

Mr. Harmon: On plumbing and everything else.

Mr. Licking: Have you the inspector's reports?

(Document was handed to Mr. Licking.)

Mr. Licking: Stipulate that that is the fact.

(Testimony of F. Allen Taylor.)

Mr. Harmon: All right.

Q. There are a number of occasions when this shows a considerable number of employees out there on the job when a much smaller number is shown here?

A. I didn't make a man-to-man comparison between that document and the time cards, but when I first started on the case, I made a comparison between them in the actual payrolls and I found them agreeing in all instances. In other words, the payrolls reflect the same number of employees that the time cards [109] do.

Q. Isn't it true that so far as this record is concerned, it does show the items, all the items in the payrolls and the time cards?

Mr. Licking: Already been asked and answered. He said it doesn't.

The Court: Overruled.

A. I couldn't swear that all on the time cards are on the payrolls exactly, because I haven't made a detailed check in that respect.

Q. (By Mr. Harmon): You made no discovery of any great discrepancy on that score, though, did you?

A. No. I didn't examine that at all.

Q. Now, going to the last figures on your breakdown, I think you testified you found some \$15,-327.67 rather than the thirteen thousand-odd dollars covered in the claim, to begin with, is that right?

(Testimony of F. Allen Taylor.)

Mr. Licking: He found that or he found that the records submitted by the claimant did?

Mr. Harmon: He found that through his record.

A. That is correct. The figures that we took from the time cards weer actually lifted off by Mr. Ferguson and they totaled \$15,327.

Q. Now I think you testified that you broke that item down into three months based upon the period of time; the first amount, [110] October 20, expenditures up to that time, \$9,524.01, is that right?

A. Yes.

Q. Now, I didn't get the breakdown on the other two items. Will you give me item No. 2 again, please?

A. The \$9500 is all of item No. 1.

Q. Yes.

A. That is, \$7,229 in the first three weeks of item No. 2, I have taken that in order to get to the date of October the 14th. You asked me the amount of item No. 2. Item No. 2 consisted of six payrolls, but when I arrived at the \$9500, in order to determine the amount shown on the cards spent before October 20, I had to take the three payrolls off of item No. 2, and that makes the total of \$9500, leaving in item No. 2, which was \$5,091 off the six payrolls—I have taken 2700 off of that, which leaves it approximately \$2,390 in item No. 2.

Q. Now, you didn't give me the date covered by that period No. 2.

A. The full period No. 2 covers from the week

(Testimony of F. Allen Taylor.)

ending September 30, 1942, to 11-4-42. The last three payrolls of that period would cover the week ending October 21, 1942, to November 4, 1942.

Q. Now, if I get you correctly, this item of \$2,391 represents the period October 21 to November 4? A. That is true.

Q. And the other part of it is a sort of duplication of the 9500 [111] and you eliminated that from No. 2?

A. Yes, the first three payrolls there.

Q. All right.

A. I added that onto the first period.

Q. Now give me the dates on the third period and the amount.

A. The third period, the last ten payrolls, covers the period from week ending November the 11th, 1942, to January 20th, 1943, and the total amount which we have listed for installation, which we assume was installation of fixtures, was \$2,282.10, and the total payrolls in that period, including water heater installation and gas range installation, was \$2815.19.

Q. Now, which figure did you allow on your final computation?

A. I am not sure just which computation you refer to changes the conclusion that the actual cost as shown by these cards compared by what we could get off of them was \$5,803; I included all the costs of instllation costs, including water heaters and the ranges.

(Testimony of F. Allen Taylor.)

Q. In that period No. 3, then, what was the figure you reached? A. \$2,815.59.

Q. Now in reaching that figure of \$5,803.60, you eliminated entirely that period No. 1, didn't you?

A. The 9500, yes.

Q. Why did you do that?

A. I said I eliminated that entirely, I allowed \$80.85 which was shown on the cards as being installation of water heaters, [112] and the \$9500 which we listed as representing the installation of plumbing—the cards say “installation,” they don't say what—so we assumed that, inasmuch as they didn't designate water heaters or range installations, that that was intended to be the installation of fixtures, and so the \$9500 of that period was the amount that we listed which we assumed represented the installation of fixtures.

Q. That is an assumption on your part? You say you assumed that?

A. It says installation.

Q. Mr. Taylor, as I recall it, you testified that you eliminated that \$9500 because that represented the period prior to October 21 during which there had been no installation, because there had been no installation prior to that time.

A. Because there had been no installation of plumbing fixtures.

Q. Well, what do you mean by that? Do you differentiate between plumbing fixtures and the installation of any of these items, other items?

(Testimony of F. Allen Taylor.)

A. I didn't differentiate between them. The differentiation was made in the claim itself. The contractor set out so much for installation of fixtures, from which he separated the installation of heaters, and I was simply trying to make a list that would be comparable to the claim.

Q. Now, you know as a matter of fact, there were substantial charges incurred before that time, didn't you? [113]

Mr. Licking: Substantial charges for what?

Mr. Harmon: Installation of these mass purchase items that are covered in the claim.

Q. Do you understand the question?

A. I am not sure of that.

Mr. Licking: This exhibit here shows that none of them except the oil and water heaters were used.

Mr. Harmon: This part of it.

Mr. Licking: What?

Mr. Harmon: This part of it, and that was done, wasn't it?

Mr. Licking: The oil heaters and water heaters?

Mr. Harmon: Let me show you—I have defendant's Exhibit No. A and I call your attention to the page for September 24, 1942—wait a minute, that must be the wrong one—September 25, 1942.

Mr. Licking: May I see it?

Mr. Harmon: Yes (handing document to Mr. Licking).

Q. You note here there were——

Mr. Licking: Just a moment. No objection.

(Testimony of F. Allen Taylor.)

Q. (By Mr. Harmon): Do you note here that there were 20 plumbers and one apprentice plumber? A. Oh, yes.

Mr. Licking: To which I object——

Q. (By Mr. Harmon): And do you note that——

Mr. Licking: If the Court please, that is not responsive to [114] the question; he is discussing the installation of particular fixtures, and on this document there is some \$2400 worth of work shown which is not covered on this installation at all.

The Court: I think that is proper cross-examination. Overruled.

Q. (By Mr. Harmon): Do you note here that in the discussion it is “plumbers installing water heaters and ranges”? A. That is right.

Q. Down here it says, “Two plumbers installing plumbing fixtures,” is that right?

A. Yes, sir.

Q. Now we come to the next page here on September the 26th, you notice that it has here, “1 foreman, 2 plumbers on plumbing tests.” “Men also working on porches and stairs, laying linoleum, installing electric fixtures, water heaters and ranges and hardware.” A. That is right.

Q. On September the 28th it says, “Two plumbers installing heaters and water heaters.”

A. Yes, sir. Do you find the one that says they started installing water heaters and the next one that said they started installing plumbing fixtures?

(Testimony of F. Allen Taylor.)

Q. We will come to that a little bit later. If you can find that, we will be happy to have you, but right now I want to ask you the questions. This is the one for September the 29th. That [115] involves one foreman, five plumbers installing ranges and water heaters.

A. That is right.

Q. That is on another phase of it; we won't go into the record on that. September the 30th, "two plumbers installing heaters and water heaters."

A. Yes.

Q. "One laborer and one plumber on plumbing tests."

A. That is right.

Q. October the first, "two plumbers installing heaters and water heaters"; October the third, "one foreman and plumbers installing heaters and water heaters, and two plumbers fixing chimneys"; October the sixth, "one foreman, three plumbers on heaters and water heaters and ranges; October the eighth, one foreman, two plumbers installing heaters, water heaters and ranges; on the 12th, one foreman, four plumbers and one helper installing heaters, water heaters and ranges; on the 13th, one foreman, three plumbers installing heaters, water heaters and ranges; October the 14th, one foreman, five plumbers installing heaters, water heaters and ranges; on the 15th, one foreman, two plumbers installing heaters, water heaters and ranges; on the 16th of October, one foreman, four plumbers installing heaters, water heaters, ranges; on the 19th, one foreman, three plumbers installing water heat-

(Testimony of F. Allen Taylor.)

ers and ranges; on the 21st, one foreman, eight plumbers installing heaters, water heaters and ranges and [116] fixtures.

Now, those are all there in the reports, are they not? A. That is true.

Mr. Licking: As a matter of fact, counsel, doesn't the compilation that the witness testified to show that those items were——

Mr. Harmon: I understand, Mr. Licking——

Mr. Licking: You have the compilation that the witness figured; doesn't that show an allowance for the installation of those heaters?

Mr. Harmon: No, it makes no allowance as far as I know.

Mr. Licking: Pardon me; I am talking—I furnished you with a copy of the compilation prepared by the witness here. You have it. He just testified he allowed \$80.00 for that period. I furnished that to you, and as a result of that—at the opening of the case—it shows an estimate of \$2,624.65 allowed for water heater installation for that period, doesn't it? Maybe I misunderstand it.

Mr. Harmon: Well, the items I have read here are away more than that.

Mr. Licking: Are they?

Mr. Harmon: I think they are.

Mr. Licking: Well,——

Mr. Harmon: And we have some further evidence on that to put on in rebuttal when I finish my cross-examination. [117]

Q. Isn't it a matter of fact, Mr. Taylor, that

(Testimony of F. Allen Taylor.)

you didn't allow anything other than \$80 up to October 20?

A. In forming this \$5,803?

Q. That is right.

A. No, that is not exactly correct, because on—there was \$80 on the first period—that is up to the first 13 payrolls, and then up to October 20 there were three more payrolls that amounts were taken from the time cards, and that amount was roughly—I can add those up for you—another \$449 added to the 80—86—in the \$5800 which we listed from the time cards we found that \$531 approximately were listed for the installation of water heaters and gas ranges prior to October 20.

Q. Now, Mr. Taylor, calling your attention to the first pages of this memorandum which you testified to the other day—I guess it isn't the first page——

Mr. Licking: Pardon me, counsel, if it is of record—do you mean the memorandum from which he testified or the memorandum to which he testified?

Mr. Harmon: The memorandum which he used to refresh his recollection to testify. That is the memorandum from which he testified.

Mr. Licking: Yes.

Q. (By Mr. Harmon): Isn't it a fact that in this memorandum which you used in your testimony the other day you deducted all of payroll No. 1 in the sum of \$9,524.21? [118]

A. Not exactly, that doesn't deduct all those payrolls, that deducts all of them with the exception of

(Testimony of F. Allen Taylor.)

approximately \$531 for the installation of water heaters and gas ranges. The list that we have made for that period totals \$9,524 under the heading of installation. In addition to that, during that period we listed off \$531 for installation of water heaters and gas ranges.

Mr. Harmon: That is all.

Mr. Licking: I have no further questions. If the Court please, for the convenience of the Court, I would again like to offer the memorandum from which Mr. Taylor has testified, which merely collects certain figures and shows the application and the reference to exhibits already before the Court.

Mr. Harmon: We object on the ground no foundation has been laid for it.

The Court: I will sustain it.

THOMAS R. NICKEL

recalled for the plaintiff, in rebuttal, previously sworn.

Direct Examination

By Mr. Harmon:

Q. You are the same Mr. Nickel who testified the other day?

Mr. Licking: I will stipulate to that.

Q. (By Mr. Harmon): You testified the other day that you were the keeper of the records of the Frick Plumbing Company during this project?

A. Yes.

(Testimony of Thomas R. Nickel.)

Q. And they were made by you personally and under your personal supervision, is that right?

A. Yes.

Q. Have you had occasion since you were in court here the other day to go over those records once more, and by those records I mean the ledger sheets and time cards and this architect's report, Defendant's Exhibit A?

A. I had a very short time, very rapidly went over them and checked them again.

Q. And did you at that time take from those documents the items which went to make up the original claim, the figures of which you gave to Mr. Lindsay some years ago? A. Yes.

Mr. Licking: To which I object on the ground it is not rebuttal.

The Court: Overruled.

Q. (By Mr. Harmon): I show you here a document in typewriting marked "Summary of Costs on Installation"—

Mr. Licking: The further objection is it is conclusion and the Court's attention can be called to the original exhibits.

The Court: Overruled.

Q. (By Mr. Harmon): Is that the summary which you made (exhibiting document to witness)?

A. Yes, that is the figures placed in the summary which I drew [120] off the ledger sheets.

Q. Are those figures actually in the ledger sheets and the time cards? A. They are.

(Testimony of Thomas R. Nickel.)

Mr. Harmon: I would like to offer that in evidence.

Mr. Licking: If the Court please, what is the purpose of this offer in evidence, may I ask, to show what?

Mr. Harmon: The purpose of this, if the Court please, is to show a breakdown——

The Court: A breakdown of what?

Mr. Licking: A breakdown of what?

Mr. Harmon: ——of the claim that was filed here.

Mr. Licking: Now, wait, is this supposed to be a breakdown of the claim which was filed?

Mr. Harmon: It is a breakdown of the costs——

Mr. Licking: Wait a minute. I am asking if this is supposed to be a breakdown audit of the claim which was filed. That is the only thing that has been in evidence before the Court. Or is this something else? If it is something else, it isn't rebuttal.

Mr. Harmon: It isn't something else; it is a breakdown on that claim. There may be some difference between them. There is a period of five years between the time one was prepared and this, but it is a breakdown——

Mr. Licking: If the Court please, may I ask if in that [121] five years there has been any change in the books of record, since that claim was made?

Q. (By Mr. Harmon): I will ask that: In that five years since that claim was made, has there been any change in the books of record?

A. No; other than there are some copies I noticed

(Testimony of Thomas R. Nickel.)

some of the other gentlemen had just checked, but there were no changes in the records themselves.

Mr. Harmon: I will renew my offer.

The Court: It will be received.

(The document referred to was marked Plaintiff's Exhibit No. 9 in evidence.)

Mr. Harmon: You may cross-examine.

Mr. Licking: I have no questions.

Mr. Harmon: Mr. Lindsay, will you take the stand?

RAY T. LINDSAY

recalled for the plaintiff in rebuttal, previously sworn.

Direct Examination

By Mr. Harmon:

Q. Mr. Lindsay, directing your attention to the time at some time subsequent to the filing of the claim herein, I will ask you if Mr. Taylor made any request to you at any time for all the supporting data for your claim.

Mr. Licking: To which I object on the ground it is immaterial. [122]

The Court: Overruled.

A. To the best of my recollection, he never asked me for any information at all.

Q. (By Mr. Harmon): Did anyone representing the Government ask you for any information?

(Testimony of Ray T. Lindsay.)

A. Yes, Mr. Lindstrom asked me for information.

Q. Who is Mr. Lindstrom?

A. Mr. Lindstrom was the——

Mr. Licking: May I have the general objection, if the court please, to all of his testimony? It is not rebuttal.

The Court: Very well.

Q. (By Mr. Harmon): Did you state who Mr. Lindstrom was?

A. It is my understanding Mr. Lindstrom was in charge of adjusting claims. He is the one that contacted me direct.

Q. Do you recall about when it was that he made a request of you?

A. Along in the early part of 1945.

Q. Do you remember what he requested from you?

A. He requested the plumbers' payrolls only.

Q. Did he request anything else?

A. To the best of my knowledge, nothing else.

Q. Did you supply those payrolls to him?

A. I did.

Q. Did you supply everything that was ever requested to him? A. Yes, we have. [123]

Mr. Harmon: That is all.

Cross-Examination

By Mr. Licking:

Q. The time cards and ledgers which were fur-

(Testimony of Ray T. Lindsay.)

nished at my request after the institution of this action are correct, are they not?

A. Did you say are they correct?

Q. Well, they are your original records?

A. They are the plumbers' original records.

Q. They are the plumbers' original records?

A. Yes.

Q. So far as you know, of course, they are correct?

A. As far as I know.

Q. Those are the basis of your claim?

A. That is right.

Q. That is, the sixty-eight hundred and some odd dollar claim you put in for profit and overhead?

A. Yes.

Mr. Licking: That is all.

Mr. Harmon: Plaintiff rests.

Mr. Licking: May I ask—Just take the stand again.

Q. You said the first request for any more supporting data or any supporting data was when?

A. As I recall it, in 1945, early 1945.

Q. Early in 1945? A. Yes. [124]

Q. This—May I see Exhibit 10-E—this, I take it, is what you referred to in April of 1945? Calling the witness' attention to Exhibit 10E (exhibiting document to witness).

A. This is some correspondence in connection with it.

Q. Calling your attention particularly to the third paragraph of the letter after your claim was submitted and apparently denied:

(Testimony of Ray T. Lindsay.)

“Should you decide to make an appeal, then an original and one copy should be sent direct to the head of the department and two copies of same sent to this regional office. Clarity in making an appeal and its supporting data promotes an early decision by the head of the department. That, as a suggestion, an appeal be made up of four divisions, as follows:

1. Facts.
2. Your claim.
3. The contracting officer's decision.
4. Your reasons for appealing the decision of the contracting officer.

“The above named divisions should be amplified by complete explanatory elaborations (a) clearly stated and explained in concise, understandable terms; (b) evidence when necessary by factual, oral statements or quotations giving names of persons having made the statements; (c) giving positions, titles or related connection with the contract work when [125] mentioning names; (d) giving locations and addresses when using names of proper people or places.

“The evidence submitted can only be evaluated by proper review and investigation and therefore, the entire appeal should be very carefully made up to include only that which would upon investigation prove true and authentic.”

That was, you say, some of the correspondence and some of the directions with reference to the matter? A. Yes.

(Testimony of Ray T. Lindsay.)

Mr. Licking: I have no further questions.

Mr. Harmon: That is all. We submit it, if Your Honor please. Twenty days to a side?

Mr. Licking: If the Court please, I move to strike the last testimony on rebuttal on the ground it isn't rebuttal.

The Court: It seems to me it is clearly rebuttal because of the fact Mr. Taylor called for this information and didn't receive it.

Mr. Licking: I am not speaking of that. I am speaking of the new summary which was introduced into the matter.

Mr. Harmon: That clearly is rebuttal, too, if Your Honor please.

The Court: Yes, I am satisfied it is.

Mr. Licking: May I have an opportunity to—may I have an opportunity to examine that document slightly there? I may wish to put on about five minutes of surrebuttal testimony. I [126] doubt if I will.

The Court: Do you want a recess now?

Mr. Licking: I think five minutes should be ample.

The Court: Recess.

(Recess.)

Mr. Licking: Will you take the stand, please, Mr. Taylor?

F. ALLEN TAYLOR

recalled for the plaintiff, in surrebuttal; previously sworn.

Direct Examination

By Mr. Licking:

Q. I call your attention now to Exhibit 8, this exhibit consisting of four sheets, lists fixtures concerning the installation of which the dispute arose, correct? A. Correct.

Q. And this, referring to Exhibit 6-A, lists delivery of the items which are set out in the delivery dates—the delivery dates of the items set out in Exhibit 6-A set out the delivery dates of the items set out in Exhibit 8? A. That is right.

Q. You have now before you a copy of Plaintiff's Exhibit No. 9? A. Yes.

Q. And you also have with you your summary of the material you had, plus that furnished by the claimants, that is, the claimants' time cards, ledgers and so forth? A. Yes. [127]

Q. Could you state to the Court wherein the summary, which was admitted by the Court as Plaintiff's Exhibit No. 9, differs, if at all—that is as to items included—from those submitted in support of the original claim?

Mr. Harmon: May I have that question, please?
(Question read.)

A. I haven't had time, of course, to figure it out to the penny, but I see some items that are roughly different from our estimate of \$5800.

Q. (By Mr. Licking): I am not asking about

(Testimony of F. Allen Taylor.)

your estimate, I am asking if there are any items that are different than those that are submitted in support of the original claim, the payrolls and data that were submitted.

A. Different from the original claim?

Q. Different from the data submitted in support of the original claim.

A. In the original claim the total cost was submitted as \$13,000 and we had no data, breakdown of it.

Q. Except the payrolls?

A. Except the payrolls.

Q. And you had also the invoices submitted by the subcontractors too——

A. Yes.

Q. ——to the main company, but that was all you had. Now, referring to the summary which you prepared and the summary analysis [128] of the ledger sheets and time cards and other data subsequently submitted in support of the claim in this action, is there any difference that you note between this summary of costs which is Plaintiff's Exhibit 9 and your summary in that respect?

Mr. Harmon: Objected to as irrevelant and immaterial.

The Court: That seems to me to be the most relevant question I have heard here. Overruled.

A. Yes, there is a difference between this and the summary that we prepared.

Q. (By Mr. Licking): Can you explain it to the Court, please?

A. This——

(Testimony of F. Allen Taylor.)

Q. "This" referring to——

A. It is Exhibit 9—is that it?

Q. Referring to this summary of costs which is submitted as Plaintiff's Exhibit 9.

A. Yes. It includes the first four payrolls—that is prior to October 20.

Q. The first four payrolls?

A. Those are the payrolls for Harmon.

Q. What periods?

A. From the period ending September 23 to period ending October 14, 1942, which total roughly \$3500 in a list of actual handling and installation costs of hot water heaters, water closets, lavatories and sinks.

Q. (By Mr. Licking): At that time had there been delivered [129] any items other than heaters?

A. The first delivery of lavatories and sinks was October the 20th or 21st.

Q. The oil heaters and water heaters were delivered, according to Exhibit 6-A, on August 4.

A. They were delivered early.

Q. And up till the 21st there had been no other items delivered? A. That is true.

Q. That is, of these items described in Exhibit 8. What charge, did you say, is ascribed on the amount of payrolls from 9-23 to 10-21, just roughly?

A. About 35 or 36 hundred dollars.

Q. I am just asking for a rough statement because it is a matter of computation which the Court can make from the summary. There is about \$3600

(Testimony of F. Allen Taylor.)

there; that is, in the first item in this summary, payrolls.

Now, going down to the next item, actual handling and installation costs.

A. That item is for gas ranges only installed from October 14 to December 9, and that figure amounts to——

Q. I am not asking what it amounts to, I can read it off this, but I am asking what discrepancy, if any, was there between that and your summary.

A. Ours is about the same. That is consistent.

Q. That is, as to the actual cost? [130]

A. Yes, the cost of installing—handling gas ranges we have the sum of 290 and 429, makes approximately 720——

Q. Which you allowed?

A. So we figured we have no difference in that item.

Q. And that you got from the ledger sheets here?

A. We got that from the ledger sheets.

Q. Can you, just for the Court, point that out on the ledger sheet?

Mr. Harmon: Which item is it you are talking about, Mr. Licking?

Mr. Licking: Talking to the second item, your summary, actual cost of installation of each item, gas ranges.

A. It is—item No. 41 is a special ledger sheet here for it, and items are apparently posted from the payroll there marked “Gas ranges.”

(Testimony of F. Allen Taylor.)

Mr. Licking: If the Court please, it was stipulated with reference to these ledger sheets that the items which are marked and checked in red here were the items which were the basis of the original claim.

Mr. Harmon: I don't recall that was stipulated, but the amounts were checked.

Mr. Licking: Well, that is a fact, is it not, Mr. Nickel?

Mr. Nickel: I will take the stand any time you want me to——

Mr. Licking: If you will do it now just briefly.

Mr. Nickel: I checked it all with payrolls——

Mr. Licking: I didn't ask you that. I asked you if it is not a fact that the figures checked in red on these ledger sheets were the figures from which your original claim was made?

Mr. Nickel: Those with two checks were an audit check of the entire payrolls, yes.

Mr. Licking: For that purpose was that red ink or red crayon put on there?

Mr. Nickel: Checked from our payroll.

Mr. Licking: What?

Mr. Nickel: Our entire audit sheet I checked with a double check, you might call it.

Mr. Licking: Weren't those red figures put on there and didn't you state to me in the presence of your counsel and in the presence of Mr. Lynch, Mr. Ferguson and the witness here that these figures appearing on your ledger in red, those eight items, were the basis of the claim?

(Testimony of F. Allen Taylor.)

Mr. Nickel: I did not.

Mr. Licking: You did not?

Mr. Nickel: You asked me about those red figures. I told you those were credits rather than debits.

Q. Well, they show items paid. Those have no relation to the claim as originally submitted?

Mr. Nickel: Red check marks?

Mr. Licking: Yes.

Mr. Nickel: The red check marks—— [132]

Mr. Licking: Yes.

Mr. Nickel: ——have no connection with this claim.

Q. (By Mr. Licking): Have you any recollection on that, Mr. Taylor? Did you check over this ledger?

A. I don't recall the red checks that you have reference to. May I see them?

Q. Well, there are certain red check marks appearing on all the ledgers here.

A. I can't testify as to the check marks.

Q. You can't testify as to the check marks. Did you check over the ledger entries with reference to the original claims or did Mr. Ferguson do that?

A. Mr. Ferguson did all the spot checking.

Q. All right. If you will get off the stand a moment, please. May I withdraw this witness temporarily?

The Court: You are going to put him back on?

Mr. Licking: Very well. Mr. Ferguson.

GUY H. FERGUSON

recalled for the defendant in surrebuttal, previously sworn.

Direct Examination

By Mr. Licking:

Q. Mr. Ferguson, I show you now what purports to be the ledger sheets of the Frick Company, the subcontractor, whose invoice to the complainant here is a part of the basis of the complainant's claim. Have you seen those before? [133]

A. Yes, sir.

Q. What was the occasion of your first seeing them? Do you remember when it was?

A. Approximately about two weeks ago I first seen these.

Q. And that was after you were in attendance in court when this case was originally called for trial?

A. It was after that case was called here.

Q. After the case was called for trial?

A. Yes.

Q. Do you recall at that time being present at a conversation between Mr. Nickel and Mr. Lindsay and counsel, when I requested to be furnished with the basis for the claim, that is, the original entries? A. That was in your office, yes.

Q. At that time it was agreed there would be furnished the ledger sheets and also the time cards?

A. Yes.

Q. Do you recall a conversation with Mr. Nickel

(Testimony of Guy H. Ferguson.)

concerning the significance of the red check marks on the ledger?

A. Yes, I remember there was something mentioned about the red marks here.

Q. There was something mentioned?

A. Yes.

Q. As a matter of fact, weren't these red marks stated to be the indicia of those items which form the basis of this claim? [134]

A. The——

Mr. Harmon: If the Court please,——

A. The red checks——

Mr. Harmon: Just a moment, Mr. Ferguson—I object to that question on the ground it is leading and also an attempt to impeach Mr. Nickel on an immaterial matter.

Mr. Licking: It is a collateral matter, whether he lied or not.

Mr. Harmon: Well,——

The Court: Overruled.

A. I understand that the red entries in here——

The Court: No, not the understanding——

Q. (By Mr. Licking): You understood the conversation between Mr. Nickel and myself in your presence?

A. That is what I am saying. I understood that the red entries in here were credits that they had put in there.

Q. (By Mr. Licking): Credits that they had put in there?

The Court: You understood—that means nothing.

(Testimony of Guy H. Ferguson.)

Mr. Licking: —were credits that they had put in there—did or did not those red entries have any relation to the claim?

A. They might not have any bearing on this particular case that we have because this is the general ledger here.

Q. It might not have any bearing on it?

A. Yes, it couldn't have any bearing on it, and then possibly in some cases it might be an entry that would apply to the [135] installation.

Q. I asked you to check this ledger—the ledger entries. A. I did.

Q. With reference to the claim here?

A. Yes.

Q. Well, what is the significance of the red checks?

A. What the red checks are on here I don't know, these check marks. The check marks weren't discussed. The way I understood it, it was the entries in here that were in red.

Q. The entries in red?

A. The entries in red. That is my understanding.

Q. The entries in red were what you checked?

A. No, I checked payrolls here as he has it listed under the item of installation, that is what I have checked from these ledgers.

Q. Then the red entries meant nothing to you?

A. No, sir.

Mr. Harmon: I move it all be stricken.

(Testimony of Guy H. Ferguson.)

Mr. Licking: Then I am mistaken about that.

A. No, the red entries didn't mean anything to me.

Mr. Licking: I am mistaken about that. That is all.

Cross-Examination

By Mr. Harmon:

Q. Mr. Ferguson, while you are on the stand, just one question: Isn't it true that the time cards and ledger sheets were delivered to you and you had the fullest opportunity [136] to check one against the other—against the architect's report?

A. I did.

Q. And you found them in substantial agreement, did you not?

A. They are substantially correct, according to the ledger sheets where he has them itemized as installation.

Mr. Harmon: Thank you. That is all.

Mr. Licking: That is all.

Mr. Harmon: Are you putting Mr. Taylor on now?

Mr. Licking: Yes. I have no further cross-examination.

The Court: Have you any cross-examination?

Mr. Harmon: I have one question to ask of Mr. Taylor. I am not sure that I understood his testimony. I want to be sure on it, and then I want to ask him a question on it.

F. ALLEN TAYLOR

was recalled for the defendant in surrebuttal, previously sworn.

Cross-Examination

By Mr. Harmon:

Q. Did I understand the purport of your testimony when you were last on the stand as to the difference between your summary and the plaintiff's Exhibit 9 was certain items which appear on that exhibit prior to the date of receipt as shown on the document of those items, is that right?

A. That is true.

Q. In other words, your thought is, or your testimony is that there are charges here for installation of certain items which [137] have not yet been received, is that right?

A. That is right.

Q. All right. Mr. Taylor, are you not aware of the fact that to make an installation of that nature out there, it is necessary to do a large amount of what they call prefabrication work, so that the installation can be completed without delay when the fixture arrives?

A. I am glad you asked me that, because I believe that from the ledger entries some of the entries are marked "Prefabrication and installation," which meant that they have charged against the installation of fixtures the prefabrication of the pipes in the shop off of the site and then when that is delivered to the site, they have installed prefabricated pipes for the fixtures, and in this case

(Testimony of F. Allen Taylor.)

maybe the bathtubs were backed up to the site and added to the prefabricated pipes, and it appears in the records from the ledger in some of the items where it says, "Prefabrication and installation." They have included as the cost of installing plumbing fixtures some of the labor which went toward the prefabrication of the pipes in the shop off the site. That went on over there as well as at the site itself, so it is very difficult to distinguish from the entries in the ledger just which items went for the actual installation of fixtures, and that is why we have taken a greater scope of payrolls in making our take-off from the cards than you have. [138]

Q. Mr. Taylor, due to the fact—your answer is not responsive, but I don't think I will move to strike it, because he has said somethings that bring us down to the meat of this thing—you have sought to eliminate so far as you could any charge for this so-called prefabrication, is that right?

A. I don't like to put it that way.

Q. Isn't it true—you can answer it yes or no and then explain it.

A. No, because I am not in a position of eliminating any charges; I am in a position of attempting—I always have been—attempting to find out what labor the contractor expended which was in addition to his contract requirements, the additional labor by reason of installing plumbing fixtures at the direction of the Government men in the field, and as far as I could find, there is only one entry in the book I can call your attention to on this

(Testimony of F. Allen Taylor.)

exhibit that shows that there is an extra charge.

Q. Never mind, Mr. Taylor. Come back to the question I have already asked you and give me an answer directly to this question without explanation.

A. All right.

Q. Are you not aware of the fact that before plumbing fixtures or oil heaters or ranges or whatever was called for in these mass purchase units could be installed there had to be a prefabrication of connections and what not so that the fixtures could be fitted into place properly?

Mr. Licking: Counsel, may I ask you a question?

A. No.

Q. (By Mr. Harmon): You aren't aware of——

Mr. Licking: Counsel, do you now contend—do you gentlemen now contend that the prefabrication of pipe connections is a part of this claim that is merely for installation? Do you now contend that?

Mr. Harmon: It is our position——

Mr. Licking: If you do, if the Court please, I should like to be relieved from the stipulation under which the affidavit of Mr. Frick was introduced in this case. It was stated that all that was concerned in the original estimate of \$35 a unit—that is \$35 a room or a house for the installation—and may I see that itemization of fixtures? That is, all water heaters, lavatories, water closets, sinks, trays, refrigerators, and ranges—those unit installations, those were the things that were not delivered, there hasn't been any particular question as to pipe to which those would be attached would be delivered or

(Testimony of F. Allen Taylor.)

not, Mr. Frick's affidavit was to the effect that \$35 was the unit installation cost of installing the sink, the closet, the lavatory, all of the other items set off in the exhibit—of installing those—that is, just hooking them up to existing pipes, things that were there. Now, it seems that the claim is going to be attempted to be magnified into prefabrication of [140] pipe and other plumbing units to which those were to be attached, items in amplification of the claim not in good faith, and I will ask that Mr. Frick's affidavit be withdrawn and I be relieved from our stipulation admitting it.

Mr. Harmon: We, of course, resist that, if the Court please. I think Mr. Licking's request is based on a misapprehension of what we are trying to get at. It is the plaintiff's position, if Your Honor please—we are concerned here with the cost of installation of fixtures and items which the Government wants to supply. Now, that term "installation" as it was used here, and if Mr. Frick were here, he would so testify, and we will put Mr. Lindsay on to that effect—the cost of installation of those includes not only the physical picking up of a fixture from the railroad siding and carrying it over and setting it down in the house, but it also included the necessary fittings to connect it to the flues and the pipes and what not, and not a part of the rough-in plumbing. Now, that is the cost which is covered by this estimate of \$35 per unit, covering what we might term in language comparable to the finished plumbing.

(Testimony of F. Allen Taylor.)

Now, this is all we are claiming here, taking the total cost of prefabrication and so on and the actual cartage and carrying and fitting it there, which under normal circumstances could have been done for \$35 per unit or less, but it was done at an actual cost of thirteen thousand odd dollars.

Now, in an attempt to dispute our claim these Government [141] auditors, based on the limited examination they had, have sought to eliminate that part of our costs, which are legitimate, and that is the only question we have here on this point and I submit that it is proper, a proper part of the installation cost and it goes to make up the total cost of installation of these plumbing fixtures. We are not asking for more damages because of delay in finishing pipes and things like that, but we do want to show that the witness has eliminated charges arbitrarily occurring on a certain date, ignoring the fact that the flues and the pipes and so on had to be prefabricated and fitted into the unit, and those are charges which we submit are proper.

Mr. Licking: May I ask one question, counsel—I don't want to have any difficulty in understanding your position—you stated your position to the court originally that what you claimed here was not for extra work done under the contract but for damages for breach of contract.

Mr. Harmon: That is right.

Mr. Licking: I believe the Court so understood the issue of this case.

(Testimony of F. Allen Taylor.)

Mr. Harmon: That is right.

Mr. Licking: And that damage consisted in the failure of the Government to deliver certain items which it is stipulated are the items set out in Exhibit 8, right?

Mr. Harmon: That is correct.

Mr. Licking: You are now questioning the witness about [142] prefabrication of items, no part of which is covered in Exhibit 8, right?

Mr. Harmon: No.

Mr. Licking: Do you mean any of the prefabricated items or any of the items of preliminary plumbing are in those items which you allege the Government failed to deliver?

Mr. Harmon: No, these are the units——

Mr. Licking: These are the units which were to be installed?

Mr. Harmon: Certainly.

Mr. Licking: And these preliminary installation costs were the matter of getting the pipes and other things ready for getting ready to hook these fixtures to, is that right?

Mr. Harmon: That is a part of the installation costs, yes. [143]

Mr. Licking: Now wait a minute; the things about which you are questioning him now are not items concerned with this except that it was something to which these fixtures must be eventually hooked up.

Mr. Harmon: It is a part of the things that must

(Testimony of F. Allen Taylor.)

be taken into consideration in estimating and figuring damage.

Mr. Licking: If that is your position I will renew my objection.

Mr. Harmon: That is the point.

Mr. Licking: I will renew my objection to the interrogation of the witness on that point, those preliminary plumbing points, that is not the question before the court. Whether those preliminary costs may be considered by the court as an item of damages for the failure to deliver things subsequently to being installed, that is the matter, the main item that the government eliminated from the original claim and about which Mr. Taylor has testified here. I object to any evidence on that score that it isn't connected and cannot be connected with the alleged breach here. Whatever the cost was of getting the building ready for the installation of these things, the various items set out in exhibit 8, that cost was not added to by the fact that the fixtures were later delivered.

Mr. Harmon: No, that is true. The added costs came from the late delivery of the fixtures.

The Court: What does that have to do with the prefabrication [144] on these fixtures?

Mr. Harmon: Simply this, your Honor, that if it is eliminated on one side of the ledger it must be eliminated on the other side. Now in computing our damage it has been done on the basis of the difference between the cost of installation of these fixtures which included each fixture at \$35 and what

(Testimony of F. Allen Taylor.)

the actual cost was. Now if you eliminate over here where the actual cost is you must also eliminate it in the \$35, and if you do that you will get the same result. I am confident.

Mr. Licking: We are not—counsel, just a moment—as I see it—pardon me for taking the Court's time further on something that seems evident—we are not discussing here a question of total cost of installation; we are discussing now the damages because of failure to deliver certain items on August 4th.

The Court: No, I can't see how it goes into the question of damages; the cost would be there whether there was delivery or not.

Mr. Harmon: That is very true, your Honor, but doesn't your Honor see that, as the testimony shows, the reasonable cost of doing that was \$7000—\$7100, I think it is—and that \$7100 includes a provision for this prefabrication. Then if you take it out of there—you have got to take it out of that \$7100——

The Court: Well, to hurry this along I will overrule the objection.

Mr. Harmon: We will be glad to argue that in the streets. [145]

Mr. Licking: If the Court please, I want to look at Mr. Frick's affidavit again and if Mr. Frick's affidavit or the testimony of anyone here—if there is any basis for the fact that prefabrication is a part of the installation estimate and there is anyone who will testify that that is a plumbing custom, I

(Testimony of F. Allen Taylor.)

want an opportunity to put other evidence on the stand, because that isn't so understand, I don't think that is the case.

Mr. Harmon: We are ready to take an issue on that, if the Court please.

Mr. Licking: You have already taken an issue on it and there is no evidence in the record——

Mr. Harmon: We will call Mr. Lindsay on that point.

The Court: Are you through with this cross-examination?

Mr. Licking: What was the last question?

(The last question and answer were read by the reporter.)

Mr. Harmon: We will put Mr. Lindsay on.

Mr. Licking: For what purpose?

Mr. Harmon: To testify to prefabrication.

Mr. Licking: If the Court please, I object to the examination of the witness on the ground it is not rebuttal. Now it appears that it is cross-examination in order to create a new issue.

The Court: What is before me now?

Mr. Licking: Mr. Lindsay, I understand, is now to take the stand and testify on the issue which we have just been [146] discussing here, that is, counsel offered to put him on the stand. It seems to me it is not rebuttal, it is part of the case in chief. It is a new issue and a surprise to me.

The Court: Proceed.

RAY T. LINDSAY

recalled as a witness on behalf of the plaintiff, in rejoinder.

Direct Examination

By Mr. Harmon:

Q. Mr. Lindsay, will you state what work was covered in the estimate of \$35 per unit and the \$105 for the community building which was the basis on which your bid was made?

Mr. Licking: To which I object on the ground that the estimate itself is the best evidence; the further objection that the estimate here is not the estimate of Mr. Lindsay but the estimate of the subcontractor, Mr. Frick.

The Court: Overruled.

Mr. Licking: Mr. Frick's affidavit is before the Court, and that Mr. Lindsay's testimony as to the basis of Mr. Frick's estimate is clearly hearsay.

The Court: He made his estimate for the bids, didn't he?

Mr. Licking: Yes.

The Court: You may answer.

A. The estimate we submitted included a portion of the fittings and entire prefabrication directly in connection with the installation of the mass purchase items. [147]

Q. (By Mr. Harmon): Does that include the item of prefabrication to connect these items?

A. Yes.

Q. That is not a part of what you call the rough-in plumbing, is it? A. No, it isn't.

(Testimony of Ray T. Lindsay.)

Q. Did you have a determination as to what the—I will withdraw that question. In other words, your estimate of \$35 per unit as a reasonable cost included not only the actual physically putting in place of these items but all connections, the pre-fabrication of those connections, the preparing of the pipe and chimneys, and so forth.

Mr. Licking: The question is highly leading.

The Court: Very leading.

Mr. Harmon: It is leading, your Honor. I am trying to shorten it.

Mr. Licking: By what device are you trying to shorten it?

Mr. Harmon: I will withdraw it.

Q. Will you state again, Mr. Lindsay, so we will have it clear——

Mr. Licking: Objected to on the ground it has been asked and answered, whatever he said before.

The Court: It has been asked and answered.

Mr. Harmon: All right, take the witness.

Cross-Examination

By Mr. Licking:

Q. So that the cost of getting the building [148] ready—the cost of getting the connection plumbing ready for installing these various items set out in exhibit 8 here was a part of your estimate of the cost of installation?

A. I didn't say the cost of getting the building ready——

Q. Well, getting the connection plumbing ready?

(Testimony of Ray T. Lindsay.)

A. Those things which were directly a part of the finished installation, yes.

Q. Those things which were directly a part of the finished installation, all right. Now, for instance, take the toilet bowl. Which of those fittings—what do you do before you get the fixtures set out here, take that one fixture, that is, the water closet and seat, that is one of the items on the second sheet of exhibit 8.

A. In the water closet you have pipes running from the outlets which come through the wall up into the tank itself and also the pipe which comes in at the base of it, and then also the connections at the bowl, and many of those have to be pre-cut and prefabricated for economy prior to installation.

The Court: The pipes have to be pre-cut?

A. Yes, and in many cases prefabricated or connected together.

Q. Prefabricated? A. Yes.

Q. Prefabricated or connected together?

A. Not only the cutting up into lengths but the threading of them and the connecting to the units, the entire fittings. [149]

Q. And that is the same sort of thing with reference to the gas ranges?

A. Yes. And water heaters.

Q. And that is the same sort of thing with reference to lavatories? A. Yes.

Q. But none of those prefabrications you talk

(Testimony of Ray T. Lindsay.)

about are a part of the items shown by this purchase order, exhibit 8?

A. No, they didn't come——

Q. Now, wait a minute. None of these items that you have explained about prefabricating are a part of the items shown by this exhibit 8?

A. I wouldn't say all of them.

Q. No, any of them?

A. There may be some fittings that came with them, but a good many of them——

Q. Wait a minute. These things that you say you had to prefabricate before you could put in these fittings, which you mention here in exhibit 8—do you understand my question? A. Yes.

Q. I say none of the matters you talk about prefabricating are a part of these items as ordered?

A. None of them, I don't believe they are.

Q. Well, do you know, you know quite well they aren't, don't you, that none of these things you speak of prefabricating are [150] included in the items here in exhibit 8, is that right?

A. For example——

Q. Not for example; if you can, answer my question.

A. Not quite all of them are.

Q. None of them are; I ask you again, isn't it a fact that none of these prefabricated things you are talking about, that you have to prefabricate, are a part of the items as ordered in exhibit 8?

A. No, they are not part of this.

Q. That is what I asked you.

(Testimony of Ray T. Lindsay.)

A. But they are necessary in connection with the installation of them. You can't install them unless you have them.

Q. Certainly, and I take it you can't install a water closet unless you have a sewer pipe leading down to the sewer.

A. You can run the piping down through the floor if you don't care where the water goes or what happens.

Q. And I suppose you could hook it onto the floor without any pipe? A. Yes, but——

Q. All right, we will get down to my question—have you another thought in the matter?

A. You have to have fittings to connect them properly so they will operate.

Q. Yes, but none of these fittings about which you are talking here, none of the prefabrication items about which you are [151] talking are a part of any of these items ordered in this request?

A. No, they are not.

Mr. Licking: All right, that is all.

Redirect Examination

By Mr. Harmon:

Q. Mr. Lindsay, was any of this prefabrication work done prior to the receipt of the actual fixtures that were installed?

Mr. Licking: To which I object on the ground it is immaterial, has nothing to do with the claim for damages in the case.

The Court: Overruled.

(Testimony of Ray T. Lindsay.)

A. Yes, it was.

Mr. Harmon: That is all.

Recross-Examination

By Mr. Licking:

Q. As a matter of fact, all of it was done before the items were installed, wasn't it?

A. Mostly prior to the installation, for the purpose of economy.

Q. Certainly, for the purpose of economy?

A. That is right.

Q. So far as that particular item was concerned, that is, the item of prefabrication, the work on this place, the failure to deliver did not increase that particular cost at all, did it?

A. In order to install——

Q. Will you answer the question? Answer yes or no and then give me the explanation. Do you understand my question? [152]

A. Give me the question.

Mr. Harmon: Let him read it and then let him give his answer and if he wishes——

Mr. Licking: I would like to have the answer first. Do you understand my question or do you want me to reframe it?

(Question read.)

A. Yes, it did increase it.

Q. How?

A. Because we had to go in and use these fittings separately, as we installed each item separately.

(Testimony of Ray T. Lindsay.)

The Court: It didn't increase the cost of the prefabricated items, did it?

A. No, it didn't, but the \$35 amount which we included in there included that cost as I have testified.

Q. (By Mr. Harmon): Why?

A. Because there is no way you can connect up a fixture without fittings and without the responsibility of connecting these fittings?

Q. (By Mr. Licking): But there wasn't any reason why you couldn't get all of the pipes ready and all of the prefabrication ready whether or not the fixtures were delivered? A. Yes.

Q. Why?

A. Because a good many of the fixtures we had been furnished shipped threading on, but we couldn't rely on it because sometimes [153] fixtures came even from the shop and there without being threaded by the government and we had to wait.

Q. All right, did you wait?

A. In some instances we did and in other instances we didn't.

Q. Why didn't you wait in all instances?

A. Because the plumber used his own judgment. If he did, there might be a joint off or something, and if he didn't prefabricate a lot of stuff he would have been wrong.

Mr. Licking: That is all.

Mr. Harmon: That is all. May we have twenty days, if your Honor please, to submit it?

Mr. Licking: I renew my motion, if the Court please.

The Court: I will consider that.

Mr. Licking: I want to renew it simply for the purpose of the record.

The Court: Very well, it will be so understood. Twenty, twenty and ten?

Mr. Licking: I want one further statement for the record: Your Honor has used the evidence in the case here and the nature of the claim as set out—that is, it is not a claim under contract—the statement in the pleadings that it was found that a certain amount was due and that a certain amount was in truth and in fact is, we ask to amend the pleadings on the faith in view of the testimony here adduced, that is, in view of the full picture of the ledgers and time cards and so forth [154] before the Court, that nothing was due at the time of the \$2600 adjustment. We would like to amend the pleadings to that effect.

The Court: That may be done. Twenty, twenty and ten, then it will stand submitted.

Certificate of Reporter

I, Clarence F. Wight, Official Reporter, certify that the foregoing pages 105-154-A comprise a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ CLARENCE F. WIGHT.

[Endorsed]: Filed March 16, 1949. [154-A]

[Endorsed]: No. 12262. United States Court of Appeals for the Ninth Circuit. Claude T. Lindsay and Martel Wilson, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 10, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 12262—S-L

CLAUDE T. LINDSAY and MARTEL WILSON,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

APPELLANT'S STATEMENT OF THE
POINTS ON WHICH THEY INTEND TO
RELY ON APPEAL

Come Now the appellants in the above matter and present their statement of the points on which they intend to rely on appeal as follows, to wit:

1. The court erroneously concluded that Article

15 of the contract sued upon by plaintiffs constituted an arbitration agreement between the plaintiffs and defendant with respect to the plaintiffs' claim herein.

2. The court erred in holding that since Article 15 of the contract was an arbitration agreement and since the determination of the amount of damages by the contracting officer was not unreasonable, and not arbitrary or capricious, and since there was no such discrepancy or inadequacy between the amount sought and the amount allowed by the contracting officer as to indicate corruption or a partisan bias, that the court was not justified in setting aside the award of arbitration.

3. The court erred in ruling that the plaintiffs could not be awarded damages in excess of \$2696.00 (the amount allowed by the contracting officer) resulting from the breach of contract by defendant, since the award of the contracting officer could not be set aside unless it was unreasonable, arbitrary, capricious or showed such discrepancy or inadequacy between the amount sought and the amount allowed as to indicate corruption or a partisan bias on the part of said contracting officer.

4. The court erred in not rendering judgment in favor of plaintiffs against defendant in the amount of \$6,833.61.

5. The court erred in not finding that plaintiffs were damaged in the amount of \$6,833.61 by reason of defendant's breach of the contract sued upon.

Dated: June 13, 1949.

JOHNSON, HARMON,
STIRRAT & HENDERSON.

By /s/ WILLIAM H. HENDERSON,

Attorneys for Plaintiffs, Claude T. Lindsay and
Martel Wilson, 1400 Central Tower, 703 Mar-
ket Street, San Francisco 3, California.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 17, 1949.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Come Now the appellants in the above matter and designate the record which is material to the consideration of the appeal as follows, to wit:

1. The pleadings of the parties;
2. The Findings of Fact and Conclusions of Law;
3. The Judgment appealed from;
4. The Notice of Appeal;
5. The Designation of Contents of Record on Appeal;
6. The Reporter's transcript of the evidence and proceedings.

It is requested that all exhibits be transmitted to

the said Court of Appeals, together with the printed record.

Dated: June 13, 1949.

JOHNSON, HARMON,
STIRRAT & HENDERSON.

By /s/ WILLIAM H. HENDERSON,
Attorneys for Plaintiffs.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 17, 1949.

No. 12,262

IN THE

United States Court of Appeals
For the Ninth Circuit

CLAUDE T. LINDSAY and MARTEL

WILSON,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

J. EDWARD JOHNSON,

W. G. HARMON,

WILLIAM H. HENDERSON,

Central Tower, San Francisco 3, California

Attorneys for Appellants.

FILED

SEP 8 - 1944

PAUL P. O'BRIEN,
OLE

Subject Index

Page

Statement of pleadings and facts disclosing basis of jurisdiction of the District Court and the United States Court of Appeals	1
Statement of the case	2
Specification of errors	5
Argument	6
A. Summary of argument	6
B. The court erroneously construed Article 15 of the contract as an arbitration agreement and erroneously found that since the determination of the amount of damages by the contracting officer was not unreasonable, arbitrary or capricious showing no discrepancy or inadequacy between the amount sought and the amount allowed as to indicate corruption or partisan bias, the court was not justified in setting aside the award of arbitration (Specification of Error No. 1 and items 1, 2, and 3, Appellants' Statement of the Points on Which They Intend to Rely on Appeal)	7
C. The court erred in not rendering judgment in favor of plaintiffs against defendant in the amount of \$6,536.27 (Specification of Errors No. 2—see also items 4 and 5, Appellants' Statement of the Points on Which They Intend to Rely on Appeal)	14

Table of Authorities Cited

Cases	Pages
Anthony P. Miller, Inc. v. U. S., 77 F. Supp. 209, 111 C. Cls. 252	13
Arthur W. Langevin v. United States (1943), 100 Ct. Cls. 15	10
Howbert v. Penrose (C.C.A. 10), 38 Fed. (2d) 577, 68 A.L.R. 820	19
Irwin and Leighton v. United States (1944), 101 Ct. Cls. 455	12, 13
Maryland Casualty Co. v. United States (C.C.A. 4), 108 Fed. (2d) 784	19
Schmoll v. U. S., 63 F. Supp. 753, 105 C. Cls. 458.....	13
United States v. Illinois Surety Co. (C.C.A. 7), 226 Fed. 653	19
United States v. Lundstrom (C.C.A. 9), 139 Fed. (2d) 792	9
United States v. Utah-Idaho Sugar (C.C.A. 10), 96 Fed. (2d) 756	19

Statutes

Act of March 3, 1875, Chapter 359	1
Act of March 3, 1891, Chapter 517, 26 Stat. 826.....	2
28 U.S.C., Section 41, subdivision 20	1, 6
28 U.S.C.A., Section 212, et seq.	2
28 U.S.C.A., Section 225(a)	2

IN THE
United States Court of Appeals
For the Ninth Circuit

CLAUDE T. LINDSAY and MARTEL

WILSON,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

**STATEMENT OF PLEADINGS AND FACTS DISCLOSING
BASIS OF JURISDICTION OF THE DISTRICT COURT
AND THE UNITED STATES COURT OF APPEALS.**

The action was commenced in the United States District Court under authority of Act of March 3, 1875, chapter 359, and Amendments thereto (28 U. S. C. Sec. 41, Subd. 20) to recover a claim for damages against the United States of America. This act provides for jurisdiction in the United States District Court in amounts up to \$10,000 when founded upon a contract with the Government of the United States of America.

The action herein is founded upon a written contract with the United States entered into June 15, 1942. (Paragraphs II and III of Complaint, R. 2-4.) A breach of this contract is alleged and it is alleged that by reason of said breach plaintiffs were damaged in the amount of \$6,833.61 and plaintiffs prayed for judgment against the defendant for this sum. (Paragraphs III, IV and VII of Complaint and prayer of the Complaint, R. 3-4, and 6.)

The basis of the jurisdiction of the United States Court of Appeals is found in Act of March 3, 1891, c. 517, 26 Stat. 826. (See 28 U. S. C. A. Sec. 212, et seq.; 28 U. S. C. A. Sec. 225(a).)

STATEMENT OF THE CASE.

Plaintiffs brought action against the defendant for a breach of contract entered into between plaintiffs and defendant. Copy of the contract and the specifications which are made a part of the contract were admitted and are in evidence as Plaintiffs' Exhibits Nos. 1 and 2, respectively. (R. 29.) Under the contract plaintiffs undertook to construct a certain defense housing project at Benicia, California. The contract provided that defendant would furnish for installation certain fixtures to be installed by the plaintiffs, including space heaters, domestic water heaters, ranges, refrigerators, bathroom fixtures, etc. (See Findings II and III, R. 12 and 13.) The contract further provided that the plaintiffs should prepare the list of the fixtures required and specify the

date of delivery to the project. The plaintiffs did this, signing requisition orders requesting delivery by the defendant to be by August 1, 1942. (Finding IV, R. 14.)

The contract was breached by defendant in that the defendant failed to deliver the fixtures by August 1, 1942, as requested by plaintiffs, but spread delivery of the fixtures over the period August 12, 1942, to January 22, 1943. (Finding IV, R. 14.) Custom and good plumbing practice in the community where the said project was to be constructed dictated that all such fixtures were to be installed in a single trip to each unit of the project. Defendant was notified that piecemeal installation of the fixtures would result in an increase in cost. Defendant, nevertheless, ordered plaintiffs to install said fixtures piecemeal as they arrived. The plaintiffs did install the fixtures piecemeal as they arrived as directed by defendant, pursuant to the contract which provided in Article 15 that in case of disputes "the contractor shall diligently proceed with the work as directed". (Findings 5 and 6, R. 14 and 15.) Article 15 of the contract also provided for certain decisions by the contracting officer and appeal by the contractor within thirty days to the head of the department with respect to disputes.

The plaintiffs followed the procedure provided for in Article 15 and made formal claim to defendant's contracting officer in the amount of \$6,833.61, excess costs. The contracting officer ruled that plaintiffs were entitled to only \$2,696.00 of the \$6,833.61 asked, which ruling was approved by the head of the department.

Plaintiffs in all respects performed all the acts and conditions of the contract on their part to be performed. (Finding VI, R. 15.)

The court found that Article 15 of the contract sued upon constituted an arbitration agreement between plaintiffs and defendant with respect to plaintiffs' claim; that the method used by the contracting officer in calculating the damage was reasonable, and not arbitrary or capricious; and since there was no such discrepancy or inadequacy between the amount sought and amount allowed as to indicate corruption or partisan bias by the contracting officer the court was not justified in setting aside the award and granting damages in addition to the amount of the award. (Finding VI, R. 15-16.) The trial court, therefore, did not render judgment for the amount of damages which the uncontradicted evidence showed that plaintiffs had suffered by reason of the breach of contract (to-wit, \$6,536.27), but only for the amount of the award of the contracting officer (\$2,696.00).

One question involved is whether the court correctly held Article 15 of the contract to be an arbitration agreement, and consequently whether its finding that plaintiffs were bound by the contracting officer's decision on damages in the absence of arbitrary, capricious, corrupt action or partisan bias was erroneous.

Another question involved is, assuming that the court erred as above indicated, should not the cause be reversed with directions to enter judgment for

plaintiffs in the amount shown to have been suffered by the undisputed, uncontradicted evidence?

SPECIFICATION OF ERRORS.

Appellants hereby specify the following errors which they rely upon in the appeal herein:

1. The trial court erroneously construed Article 15 of the contract sued upon as an arbitration agreement. In this respect it found that Article 15 constituted an arbitration agreement and that, therefore, since the determination of the amount of damages by the contracting officer was not unreasonable, arbitrary or capricious and showed no discrepancy or inadequacy between the amount sought and the amount allowed as to indicate corruption or partisan bias, the court was not justified in setting aside the award of arbitration. This construction and finding was erroneous and prejudicial inasmuch as the court by reason thereof, declined to go behind the decision of the contracting officer and award plaintiffs the damages which the uncontradicted evidence showed that they had suffered by the defendant's breach of the contract. (See items 1, 2 and 3, Appellants' Statement of the Points on Which They Intend to Rely on Appeal, R. 169, 170.)

2. The court erred in not rendering judgment in favor of plaintiffs against defendant in the amount of \$6,536.27. The trial court was not bound by the contracting officer's decision under Article 15 of the con-

tract and therefore should have awarded plaintiffs the amount of damages the uncontradicted evidence shows they suffered by reason of defendant's breach of contract. (See items 4 and 5, Appellants' Statement of the Points on Which They Intend to Rely on Appeal, R. 170.) This court, if it reverses the judgment, should direct entry of judgment in favor of plaintiffs in the amount of \$6,536.27.

ARGUMENT.

A. SUMMARY OF ARGUMENT.

In the argument we will discuss separately the points covered by the specification of errors. Under subdivision B of the argument, it will be contended that the trial court's construction of Article 15 of the contract as an arbitration agreement was erroneous. It will be shown that the courts have uniformly held that the provisions of Article 15 do not constitute an arbitration agreement and therefore the court erred in concluding that Article 15 deprived it of power to render judgment for the damages proven. Further, the decisions indicate that a holding that Article 15 was an arbitration agreement would conflict with the provisions of the Tucker Act vesting jurisdiction in the Court of Claims and District Courts to adjudicate claims arising out of express contracts. (28 U.S.C. Section 41, subd. 20.)

Subdivision C of the argument will deal with specification of error number 2, wherein it is claimed that

the court erred in not rendering judgment in the amount of \$6,536.27, which the uncontradicted evidence showed plaintiffs suffered by reason of the defendant's breach of contract. Plaintiffs will also submit that upon a reversal, the case should be remanded to the District Court with directions to enter judgment for plaintiffs in such amount, in view of the uncontradicted evidence in the case.

B. THE COURT ERRONEOUSLY CONSTRUED ARTICLE 15 OF THE CONTRACT AS AN ARBITRATION AGREEMENT AND ERRONEOUSLY FOUND THAT SINCE THE DETERMINATION OF THE AMOUNT OF DAMAGES BY THE CONTRACTING OFFICER WAS NOT UNREASONABLE, ARBITRARY OR CAPRICIOUS SHOWING NO DISCREPANCY OR INADEQUACY BETWEEN THE AMOUNT SOUGHT AND THE AMOUNT ALLOWED AS TO INDICATE CORRUPTION OR PARTISAN BIAS, THE COURT WAS NOT JUSTIFIED IN SETTING ASIDE THE AWARD OF ARBITRATION. (Specification of Error No. 1 and items 1, 2, and 3, Appellants' Statement of the Points on Which They Intend to Rely on Appeal.)

Article 15 of the contract between plaintiffs and defendant sued upon provided:

“Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.” (Finding VI, R. 15.)

With respect to Article 15, the court found:

“that said Article 15 of said contract constituted an arbitration agreement between plaintiffs and defendant with respect to the plaintiffs’ claim herein. That the method of calculating under Article 15 of the contract used by the contracting officer and head of the department resulting in said increase of \$2,696.00 and the determination by each of them was reasonable and was neither arbitrary nor capricious. That there was no such discrepancy or inadequacy between the amount sought and the amount allowed by the contracting officer as to indicate corruption or a partisan bias on the part of said contracting officer or head of the department. That the contracting officer and the head of the department did not act so inequitably so that this court would be justified in setting aside the award and granting damages in addition to the amount of the award.” (Finding VI, R. 15, 16.)

Thus the court failed to consider any evidence of the damage in excess of \$2,696.00, which plaintiff had suffered and proved by uncontroverted evidence. The flat decision was that Article 15 of the contract sued upon constituted an arbitration agreement. Based on this construction, the court concluded it was not justified in upsetting the award and rendering judgment for the full damage suffered as disclosed by the evidence. The court thus, instead of finding and awarding damages for the defendant’s breach of contract, merely found that since the contracting officer’s determination was reasonable and not arbitrary or capricious

and did not indicate corruption or partisan bias, his award as an arbitrator must stand.

The contracting officer is not an impartial third party. He is the employee of one party to the contract. Article 15 is not an arbitration clause. It is in the nature of a waiver of certain of the contractor's rights as specified in the article but it is not an agreement to have disputes adjudicated by an impartial third party, which is the essence of an arbitration agreement. All the cases specifically dealing with this provision have recognized this and have without conflict ruled that Article 15 must not be construed as an arbitration agreement.

Pertinent is the case of *United States v. Lundstrom* (C.C.A. 9), 139 Fed. (2d) 792, which specifically ruled on Article 15, which is a standard article in Government contracts. In this case the court specifically held that "disputes concerning questions of fact" are distinguishable from "an issue upon the proper interpretation of a contract", and that the decision of the contracting officer in the latter case is not binding on the courts. In reaching this conclusion the court stated at page 795:

"But, if this were true, the very untenable and paradoxical situation would be present that the government, one of the parties to the contract, would have the decision as to the meaning and extent of its contract. Provisions such as here under consideration do not relate at all to the interpretation of the contract. Issues so arising are strictly issues of law and are for the courts to determine.

“Although we do not cite it as controlling authority, we think the correct principle is concisely stated in *Rust Eng. Co. v. United States*, 86 Ct. Cl. 461. ‘It will be seen, therefore, that this item of plaintiff’s claim was denied upon the construction of the contract rather than upon the facts. It is clear that the court is not deprived of jurisdiction to consider the claim. Appeals were necessary under the contract only on disputes concerning questions of fact, and there was here no controversy as to the facts.’ ”

The Court of Claims has also in a number of cases had occasion to construe Article 15. These cases hold without conflict that Article 15 was designed to allow a speedy and final determination of certain facts only and does not purport to constitute an arbitration agreement. *Arthur W. Langevin v. United States* (1943), 100 Ct. Cls. 15 (contracting officer under Article 15 disallowed contractor’s claims for damages from delay of 18 days in making an inspection. The Court of Claims held that the inspection and decision could have reasonably been rendered in 3 days and allowed the damages shown to have resulted). The court said at page 37:

“The whole subject in the minds of the parties was the assessment of liquidated damages for delay; they did not have in mind suits against the Government for damages for delays it had caused. On the question of the assessment of liquidated damages the findings of the contracting officer as to the facts and the extent of delay were made final and conclusive, subject to appeal to the head of the department; but on the question of

whether or not the defendant had caused a delay for which it should be mulcted in damages, they have not agreed that his findings of fact should be final and conclusive.

“There is a sound reason why the parties should have been willing to agree that his findings of fact should be conclusive in one instance and not in the other. In the first it was necessary for the contracting officer to determine only that the contractor should be excused for the delay; in the latter it was necessary for him to determine whether or not the defendant had breached its contract by doing something alleged to have delayed plaintiff. The defendant well might have been willing to submit to the final judgment of the contracting officer and head of the department as to the assessment of liquidated damages in its favor, but would not have been willing to submit to the final judgment of either of them the question of whether or not it should respond in damages.

“Congress has conferred exclusive jurisdiction on this court, and in certain cases on the district courts, to decide claims against the Government. It has consented to be sued only in these forums. Can, then, some agent of the Government other than Congress validly contract that someone other than this court or a district court may finally determine the facts upon which liability of the defendant rests? Ordinarily, when the facts are once found, the case has been nine-tenths decided. Since Congress has vested in this court and in the district courts exclusive jurisdiction of cases against the government, it is not to be presumed that the parties intended that some other tribunal

should make findings of fact that would be binding on us. If they did, their agreement would be in violation of the Act of Congress vesting jurisdiction in this court and the district courts, and therefore void.

“We have consistently held that neither article 9 nor article 15 of the Standard Government Contract gives the contracting officer the power to determine a contractor’s claim for damages for delay. See *Phoenix Bridge Co. v. United States*, 85 C. Cls. 603, 629, and *Plato v. United States*, 86 C. Cls. 665, 677. See also *United States v. Rice and Burton, Receivers*, 317 U. S. 61, 67.

“In a suit against the United States for damages for delay, we do not think the contracting officer’s findings of fact on the cause or extent of delay are conclusive.”

It will be noted in the above case the court pointed out that if Article 15 constituted an arbitration agreement, it would be depriving the Court of Claims and the District Courts of their exclusive jurisdiction to decide matters vested in them by Acts of Congress.

Irwin and Leighton v. United States (1944),
101 Ct. Cls. 455, 475.

“It is true that we are not bound by the findings of the contracting officer in a claim for damages due to delay (*Langevin v. United States*, 100 C. Cls. 15), but there is a strong presumption that the delay was not less than that found. The contracting officer, or his representative, had day to day contact with the work and was in the best position of anyone, except the contractor, to know the extent of the delay. He is supposed to weigh

the facts with an even hand before rendering his decision; but it cannot be overlooked that he is the defendant's selection and its own employee. He is not apt to err on the side of the contractor and against his employer, whose interests he is employed to guard and protect. Unless the clear weight of the evidence shows the delay was less than that found by him, we think the defendant is bound by his finding. His finding in this case is not contrary to the weight of the evidence."

Schmoll v. U. S., 63 F. Supp. 753, 759, 105 C. Cls. 458;

Anthony P. Miller, Inc. v. U. S., 77 F. Supp. 209, 212, 111 C. Cls. 252, 330.

Plaintiffs here followed the procedure outlined in Article 15 with respect to the breach of contract complained of before instituting this action. This was done obviously under decisions of the courts requiring that plaintiffs exhaust their administrative remedies before seeking relief from the courts. The decision of the contracting officer and his superior is relevant to the present action only to the extent of showing that the administrative remedy was first exhausted and to show that the minimum amount of \$2696.00 at least was due to plaintiffs in the absence of clear evidence to the contrary. (See *Irwin and Leighton v. United States*, supra.)

We respectfully submit that the trial court erroneously construed Article 15 of the contract. This led to prejudicial error inasmuch as the court failed to find the actual amount as proven by the uncontradicted testimony. This, of course, requires reversal.

However, we will point out *infra* that if the cause is reversed, the case should be reversed with directions to enter judgment for the full amount of damages shown by the uncontradicted evidence to have been suffered by the plaintiffs.

C. THE COURT ERRED IN NOT RENDERING JUDGMENT IN FAVOR OF PLAINTIFFS AGAINST DEFENDANT IN THE AMOUNT OF \$6,536.27. (Specification of Errors No. 2—see also items 4 and 5, Appellants' Statement of the Points on Which they Intend to Rely on Appeal.)

The uncontradicted and undisputed evidence shows that plaintiffs suffered damages in the amount of \$6,536.27 by reason of defendant's failure to deliver the fixtures when specified by plaintiffs, as provided in the contract, coupled with defendant's insistence and order that when the fixtures did arrive, they be installed piecemeal. These orders plaintiffs were compelled to follow under Article 15 of the contract.

Briefly, the uncontradicted, undisputed evidence on damages was as follows: Custom and good plumbing practice in the community where the project was to be constructed was that all of said fixtures should be installed in a single trip to each unit. The representatives of defendant were notified that piecemeal installation would result in an increase in the cost, but they nevertheless required plaintiffs to install said fixtures piecemeal as they arrived. (Finding V, R. 14; Affidavit of E. H. Frick, Plaintiffs' Exhibit No. 6, introduced by stipulation, R. 32, 33.)

The cost of the installation of the fixtures, had they been installed according to custom and good plumbing practice, would have been a total of \$7,105, which sum included prefabrication of the necessary fittings. (Affidavit of E. H. Frick, Plaintiffs' Exhibit No. 6; R. 72, 161-165.)

As a result of the delay in the delivery of the fittings and the insistence of the government that when said fittings did arrive, piecemeal, that they be installed piecemeal as they arrived, the actual cost for the installation, which plaintiffs paid to Frick Plumbing Company was \$13,047.27. (Finding V, R. 14; 69, 72, 73, 67, 166, 167.)

The difference between the reasonable cost of installation of the fixtures, had it not been for the defendant's breach (\$7,105), and the actual cost paid to Frick Plumbing Company (\$13,047.27), was \$5942.27. Plaintiffs also incurred a loss of 10% on this \$5942.27 in reasonable cost of overhead, to-wit, \$594.00. (R. 76-77.) This makes a total damage in the amount of \$6,536.27.

The installation was done by subcontract to the E. H. Frick Plumbing Company on a cost plus basis. The charge of the Frick Plumbing Company (to-wit, the sum of \$13,047.27) was compiled from its time cards, and its ledger and was confined to direct costs only. (R. 41-45.)

Pending the trial, Mr. Nickel, field manager of the Frick Plumbing Company on the project, again made a summary of costs as reflected by the time cards,

ledger sheets and payrolls of the Frick Plumbing Company. His summary showed \$13,114.32, which was slightly more than the charge to plaintiffs (\$13,047.27) (R. 134-137, Plaintiffs' Exhibit No. 9).

Pending the trial, all the books and records of the Frick Plumbing Company requested by the Government were made available to it for examination by government agents. They were examined by Mr. Ferguson who compared the time cards with the government's architect's reports to determine whether the two were consistent with each other. Each showed on its face specifically the time spent on installation. Mr. Ferguson testified that they were substantially consistent. Thus the Government's report corroborated the time cards showing the installation work by the plumbers:

“Q. Mr. Ferguson, while you are on the stand, just one question: Isn't it true that the time cards and ledger sheets were delivered to you and you had the fullest opportunity to check one against the other—against the architect's report?

A. I did.

Q. And you found them in substantial agreement, did you not?

A. They are substantially correct, according to the ledger sheets where he has them itemized as installation.” (R. 151.)

Further, witness and employee of the defendant, F. Allen Taylor, computed charge for installation of the fixtures from the records in the sum of \$15,000—instead of \$13,047.27. (R. 106, last paragraph.)

Thus the evidence for basis of plaintiffs' claim for damages was supported and corroborated by the evidence of the government. The government offered no evidence whatsoever contradicting the actual cost to Lindsay or correctness of Frick's charges.

The evidence proffered by the government only tended to show that the contracting officer's decision was not arbitrary or capricious, and it was admitted on that theory:

"Mr. Harmon. I think at this time, if Your Honor please, I should make my motion to strike all of the testimony of this witness upon that subject as a conclusion, as pure conclusion of the witness.

The Court. I think not. There is involved writing there. In view of the fairness of this action, and the contracting officer—you challenge his action as being capricious and arbitrary and this is a direct refutation of that. The motion is denied." (R. 103-104.)

Defendant's evidence did not challenge in any respect the *actual* damages shown to be incurred by plaintiffs by the uncontradicted evidence. It did not purport to show the actual *cost* to Frick Plumbing Company. Instead, it purported to show how the government representative arrived at the figure of \$2,-696.00 which was offered plaintiffs.

Except for the claim, and affidavits (which fully supported plaintiffs' claim), the only other documents before witness Taylor when he made his estimate was the plumbing subcontractor's payrolls and copies of

daily reports by the architect. He used the payrolls from the period September 24 to November 4 and made a list of the days the architect represented the plumbers were working on the installation. Then by averaging the number of plumbers on the job, he struck an estimate and estimated that the probable expense for installing the fixtures in the period was \$3,272. Also, in a third payroll period he estimated that \$5,420 went to installation and after deducting amounts for labor, adding compensation, insurance, etc. he arrived at a total figure of \$2,694.72. (R. 91 to 103.)

How flexible this witness' calculations could be is disclosed by another calculation of this witness. While admitting that the time cards and ledgers, corroborated by the defendant's architect's report, showed actual charges of \$15,000 for installation of fixtures (R. 106), he "calculated" that charges prior to October 20, 1942 should not be included in Frick's charges for installation because no fixtures except oil heaters and water heaters had actually been delivered onto the project. The witness either overlooked or was not familiar with the fact that in any installation job there is involved a great deal of work with the fittings, called prefabrication work, prior to their arrival at the project and actual installation, which the time cards and government architect's report disclosed was done. (R. 152, 153.)

This witness entirely overlooked the fact that the estimate of \$35.00 per unit and \$105.00 for the com-

munity unit making a total of \$7,105 was based on the entire cost, including prefabrication of the fittings necessary for the installation of the mass purchase items. (R. 161 and 162.) Thus without any basis whatsoever, the government witness eliminated the cost of prefabrication of fittings, which, of course, was a necessary part of the installation costs.

We believe that even if Article 15 of the contract was properly construed as an arbitration agreement, the contracting officer's action was so arbitrary and capricious, that it should not stand. But, as pointed out supra, it is not such an agreement and, therefore, clearly plaintiffs are entitled to an award of damages as shown to be incurred by the uncontradicted, undisputed evidence.

Under this state of the record, we respectfully submit that the cause should not merely be reversed, but that the court should direct that judgment should be rendered in favor of the plaintiffs against defendant in the amount of \$6,536.27, in lieu of the judgment entered in the amount of \$2,696.00. This is proper in the interests of a speedy disposition of the cause.

Howbert v. Penrose (C.C.A. 10), 38 Fed. (2d)

577, 68 A.L.R. 820;

United States v. Utah-Idaho Sugar (C.C.A. 10),

96 Fed. (2d) 756;

Maryland Casualty Co. v. United States (C.C.A.

4), 108 Fed. (2d) 784, 786;

United States v. Illinois Surety Co. (C.C.A. 7),

226 Fed. 653.

In granting motion to modify judgment and in entering judgment in accordance with the facts found by the trial court in the last-named case above, the court pointed out at page 664 that "This court is vested with power to modify, as well as to affirm or reverse, any judgment of the District Court * * * in a case tried without a jury, where the findings of fact made by the court are undisputed, as well as when they are agreed upon by the parties * * *"

Dated, San Francisco, California,
September 2, 1949.

Respectfully submitted,
J. EDWARD JOHNSON,
W. G. HARMON,
WILLIAM H. HENDERSON,
Attorneys for Appellants.

No. 12,262

IN THE
United States Court of Appeals
For the Ninth Circuit

CLAUDE T. LINDSAY and MARTEL WIL-
SON,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

J. EDWARD JOHNSON,

W. G. HARMON,

WILLIAM H. HENDERSON,

Central Tower, San Francisco 3, California,

Attorneys for Appellants.

FILED

JAN 17 1950

PAUL P. O'BRIEN,

CLERK

Subject Index

	Page
I. Answering appellee's contention that the award of the contracting officer under Article 15 was conclusive and binding on the District Court.....	1
II. Answering appellee's contention that if the District Court erred in limiting its judgment to the amount of the award the Appellate Court should not direct entry of judgment in the amount claimed by plaintiffs but should remand the cause for further proceedings in the District Court	7

Table of Authorities Cited

	Pages
Anthony P. Miller, Inc. v. United States, 111 Ct. Cls. 252...	2
Arthur W. Langevin v. United States, 100 Ct. Cls. 15.....	2
B. & W. Construction Co. v. United States, 101 Ct. Cls. 748	6
Bothwell v. United States, 254 U. S. 231, 65 L. Ed. 238.....	7
Ex parte French, 91 U. S. 423, 23 L. Ed. 429.....	9
Gotham Silk Hosiery Co. v. Artercraft Silk Mills, 147 Fed. (2d) 209	9
Irwin and Leighton v. United States, 101 Ct. Cls. 455.....	2
Schmoll v. United States, 105 Ct. Cls. 458.....	2
Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 57 L. Ed. 879..	9
United States v. Blair (1943), 321 U. S. 730, 88 L. Ed. 1039	3, 4, 5, 6
United States v. Callahan-Walker Co., 317 U. S. 56, 87 L. Ed. 49	3
United States v. Gleason, 175 U. S. 588, 44 L. Ed. 284.....	6
United States v. Holpuch Co. (1945), 328 U. S. 234, 90 L. Ed. 1192	3, 5, 6
United States v. Iriarte, 166 Fed. (2d) 800.....	9

IN THE
United States Court of Appeals
For the Ninth Circuit

CLAUDE T. LINDSAY and MARTEL WIL-
SON,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

- I. ANSWERING APPELLEE'S CONTENTION THAT THE AWARD OF THE CONTRACTING OFFICER UNDER ARTICLE 15 WAS CONCLUSIVE AND BINDING ON THE DISTRICT COURT.

Appellants respectively submit that the appellee has failed to answer appellants' opening brief. Appellee evades the issues. Appellants' action was for damages arising from breach of a written contract by appellee in failing to deliver certain fixtures on a specified date. The trial court found the execution of the contract as alleged, that appellee failed to deliver the fixtures as specified, that appellee was notified that piecemeal installation would result in increased cost but nevertheless ordered installation, and that appellants (pursuant to Article 15 of the contract which provides in case of dispute "contractor shall diligently

proceed with the work as directed”) did install the fixtures piecemeal as they arrived. (See Findings I to VI, R. 12-15.)

Appellants proved their damage without dispute or challenge in the amount of \$6,536.27. Despite the undisputed evidence, the trial court (erroneously construing Article 15 as an arbitration agreement) ruled that it was bound by the amount of the award of the contracting officer (to-wit, \$2,696.00) in the absence of arbitrary, capricious, corrupt or partisan bias. (R. 16.)

On pages 9 to 14 of our opening brief, appellants have cited authorities which hold that Article 15 does not constitute an arbitration agreement, that the court was not bound by the contracting officer’s decision, and that Article 15 of the Standard Government Contract does not give the contracting officer the conclusive power to determine a contractor’s claim for damages and thus oust the District Court of such jurisdiction. The authorities above mentioned include comparatively recent decisions of the Court of Claims which support appellants’ contentions in every respect.

Arthur W. Langevin v. United States, 100 Ct.

Cls. 15 (Decided May 3, 1943);

Irwin and Leighton v. United States, 101 Ct.

Cls. 455 (Decided April 3, 1944);

Schmoll v. United States, 105 Ct. Cls. 458 (Decided Feb. 4, 1946);

Anthony P. Miller, Inc. v. United States, 111 Ct. Cls. 252 (Decided May 3, 1948).

The appellee abandons the authorities cited by the trial court in support of its decision. (R. 10-11.) Appellee in disputing appellants' contentions now argues that "the Supreme Court has set at rest these contentions adversely to appellants' position" (p. 4, Brief for Appellee), citing the following Supreme Court cases:

United States v. Callahan-Walker Co., 317

U. S. 56, 87 L. Ed. 49;

United States v. Blair (1943), 321 U. S. 730, 88

L. Ed. 1039;

United States v. Holpuch Co. (1945), 328 U. S.

234, 90 L. Ed. 1192.

If, as appellee contends, the Supreme Court case of *United States v. Callahan-Walker Co.*, supra (principally relied upon), is contrary to appellants' contentions, one might wonder at the temerity of the Court of Claims to thus ignore such authority. The case of *United States v. Callahan-Walker Co.*, supra, was decided November 9, 1942, which was from approximately six months to five and one-half years prior to the Court of Claims decisions above cited, and relied upon by appellants.

We respectfully submit, however, that the Court of Claims has neither overlooked nor ignored the Supreme Court cases cited by appellee. The Supreme Court cases relied upon by appellee are not in point and give no support whatsoever for appellee's argument.

In each of the Supreme Court cases above mentioned there was a failure of plaintiffs to comply with

Article 15 and thus a failure to exhaust the administrative remedy specified in the contract before institution of court action. In the case at bar, plaintiffs fully complied with the procedure outlined in Article 15 and the court so found. (R. 15.)

There are further distinctions in the Supreme Court cases relied upon by appellee apparent from their examination which disclose that they do not in any way support the position of appellee even by implication. They do not hold (as in substance the trial court held herein) that in an action for damages arising from breach of contract, the court is bound by the decision of the contracting officer as to the amount of damages suffered (even when such decision is made without evidentiary support), in the absence of corruption or partisan bias.

In the case of *United States v. Callahan-Walker Co.*, supra, the court merely held that where pursuant to contract, changes are made in drawings or specifications, the ascertainment of the cost and reasonable allowance therefor is a question of fact, and since Article 15 was not complied with, the contractor was without standing to maintain his suit.

The case of *United States v. Blair*, supra, fails to support appellee but to the contrary supports the appellants' position. The Supreme Court ruled on several issues. It first held that the United States could not be held responsible for delays caused by another contractor on the project and not caused by the United States. Secondly, it held that the United

States could not be held for arbitrary and unreasonable acts, rulings and instructions of Government officials when the plaintiff had not first complied with Article 15 of the contract. The Supreme Court pointed out that Article 15 "provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers". But the court also held that damages could be recovered for such conduct of Government officials where Article 15 had been complied with, and it affirmed the judgment of the Court of Claims with respect to an item where compliance with Article 15 was shown.

In *United States v. Holpuch Co.*, supra, the court held that disputes concerning footing excavations (arising out of an inconsistency between specifications and drawings) and disputes concerning wage increases constituted "a question arising under this contract" and that respondent having failed to avail itself of the administrative procedure of Article 15 was precluded from bringing suit on such matters in the Court of Claims. The decision was expressly limited:

"The narrow question is whether a contractor's failure to exhaust the administrative appeal provisions of a government construction contract bars him from bringing suit in the Court of Claims to recover damages." (*U. S. v. Holpuch*, 328 U. S. 234, 235.)

It may be further noted that the contracts involved in the *Blair* and *Holpuch* cases are distinguishable from the one in the case at bar. In the case at bar

Article 15 is limited to “disputes concerning *questions of fact* arising under this contract” while the provisions of Article 15 in the *Blair* and *Holpuch* cases covers “disputes concerning *questions* arising under this contract.”

The case of *United States v. Gleason*, 175 U. S. 588, 44 L. Ed. 284 and the other cases cited but not discussed on page 6 of appellee’s brief are so patently not in point as to preclude necessity for discussion.

On page 7 of its brief, appellee cites the Court of Claims case of *B. & W. Construction Co. v. United States*, 101 Ct. Cls. 748. This decision does not support appellee, the court expressly distinguishing the question therein involved from the one involved in the case at bar:

“but provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and preventing resort to the courts for a determination of rights thereby accruing have never been upheld * * *.” (101 Ct. Cls. 748, 768.)

Appellee further argues that the award does not rest upon a determination that a breach of contract had occurred and that the District Court did not “find the contract to have been breached by delay or otherwise”. This is simply not true. The court found that in the contract it was provided that the defendant would furnish certain fixtures to be installed by plaintiffs, that plaintiffs should prepare a list of said fixtures and dates of delivery to the project. (R. 14, Finding IV.) With respect to breach of this obligation, the court specifically found:

“That pursuant to said provisions, plaintiffs on or about June 26, 1942, signed requisition orders requesting delivery by the defendant by August 1, 1942, of all of the items of said fixtures to be furnished by defendant under said contract. That said fixtures and equipment were not delivered by defendant by August 1, 1942, as requested by plaintiffs but actual deliveries of all said items were spread over the time from August 12, 1942, to January 22, 1943.”

There was further breached by the government the implied obligation that the contract need only be performed in accord with custom and good plumbing practice in the community where the project was to be structured. (R. 14, Finding V.)

II. ANSWERING APPELLEE'S CONTENTION THAT IF THE DISTRICT COURT ERRED IN LIMITING ITS JUDGMENT TO THE AMOUNT OF THE AWARD THE APPELLATE COURT SHOULD NOT DIRECT ENTRY OF JUDGMENT IN THE AMOUNT CLAIMED BY PLAINTIFFS BUT SHOULD REMAND THE CAUSE FOR FURTHER PROCEEDINGS IN THE DISTRICT COURT.

Appeal was taken only by the plaintiffs in this case. No cross appeal was filed on behalf of the defendant. Thus the defendant may not be heard to question the correctness of the decree of the District Court, insofar as the court ordered judgment in favor of the plaintiffs in the amount of \$2,696.00.

Bothwell v. United States, 254 U. S. 231, 65 L. Ed. 238.

Nor has appellee sought to do so. On a reversal, therefore, if remand were ordered for further proceedings,

without directions, such proceedings could only be had for the purpose of determining what damages in excess of said \$2,696.00 should be awarded to appellants. But the uncontradicted evidence shows that appellants' damages were in the amount of \$6,536.27. As pointed out in appellants' opening brief, appellee proffered no evidence contradicting the actual costs to appellants, but only evidence indicating the contracting officer's conduct was not capricious or arbitrary. Appellee reiterates again on page 13 of its brief its assertion that there was no finding or evidence of breach of contract. This is not true, as pointed out, *supra* herein.

Appellants have failed to show how in any way a direction to the lower court to make findings of damages on the uncontradicted testimony and enter judgment would not serve the interests of justice. Appellee does not show how a failure to make such a direction would serve any purpose other than delay. But there already appears to have been sufficient delay in this case as to afford appellee ample opportunity to investigate and defend the case.¹ The authorities cited by appellants in their opening brief show that this court has ample authority to direct findings and judgment for the amount of damages established by the uncontradicted evidence.

The authorities cited by appellee do not support its contention that further proceedings in the District

¹Complaint was filed *August 1, 1946*; answer was filed *January 31, 1947*; trial concluded *October 20, 1947*; judgment was entered *April 7, 1949*; printed record was furnished appellants *July 23, 1949*; appellants' opening brief was filed *September 2, 1949*; brief for appellee was filed *December 27, 1949*.

Court, other than as requested by appellants, are necessary.

The case of *Gotham Silk Hosiery Co. v. Artercraft Silk Mills*, 147 Fed. (2d) 209, involved very conflicting evidence, some of which was apparently a fraud upon the court. In the case of *Ex parte French*, 91 U. S. 423, 23 L. Ed. 429, there was a special finding of fact only, with many of the issues still untried. In the case of *United States v. Iriarte*, 166 Fed. (2d) 800, there was involved land values and no evidence had been introduced on an important factor pertaining to such values. In the case of *Slocum v. N. Y. Life Ins. Co.*, 228 U. S. 364, 57 L. Ed. 879, the case was remanded because of improper instructions to the jury which could only be cured by proper instructions to another jury.

We, therefore, respectfully request that if this court finds that the court below committed error in holding itself bound by the award of the contracting officer, that this court reverse the case with directions to the trial court to make findings and render judgment in favor of plaintiffs and against defendant in the amount of \$6,536.27 in lieu of the amount of the judgment entered herein in the amount of \$2,696.00.

Dated, San Francisco, California,
January 11, 1950.

Respectfully submitted,

J. EDWARD JOHNSON,

W. G. HARMON,

WILLIAM H. HENDERSON,

Attorneys for Appellants.

